Thos. G. Johnston.

CASES

IN

CROWN LAW,

DETERMINED BY

THE TWELVE JUDGES,

BY

THE COURT OF KING's BENCH,

AND BY

COMMISSIONERS

OF

Oyer and Terminer and General Gaol Delivery,

FROM THE

FOURTH YEAR OF GEORGE THE SECOND

TO THE

TWENTY-NINTH YEAR OF GEORGE THE THIRD.

By THOMAS LEACH, Esq.
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BARRISTER AT LAW.

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OBSERVATION.

IN preparing the Sixth Edition of Mr. Serjeant HAWKINS' PLEAS OF THE CROWN for the preſs, occaſional references were made to many of the CASES contained in the following pages; but being made from a Collection of MANUSCRIPT NOTES, which, it now appears, are not in very extenſive circulation, the EDITOR is informed, that many endeavours to procure accurate ſtatements of the circumſtances on which the CASES were determined, have been attended not only with difficulty, but diſappointment; and that unfavourable animadverſions have, in conſequence, been made on the inexpediency of having cited authorities, to a full and particular detail of which a free acceſs was not immediately to be found. To remove the cauſe of this complaint, as far at leaſt as it is within the EDITOR'S power, was the principal motive to the preſent publication; but he is ſeriouſly apprehenſive that his anxiety for this purpoſe, has led him to attempt a work which, from the *latent* nature of its ſubject,

ſeems peculiarly to require the opportunities of longer time, and the advantages of patient application, before it can poſſibly advance towards maturity or perfection.—He flatters himſelf however, that his labours, though deficient, will be capable of conveying ſome uſeful information; and he truſts that the intelligence he may hereafter derive from the friendly communications of the Profeſſion, which he moſt earneſtly ſolicits; or from the liberal and candid expoſitions, whether public or private, of the errors and imperfections which he is fearful the work contains; will enable him, by correction, to increaſe its utility, and to render it, at a future period, in ſome degree deſerving of profeſſional and public approbation.

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CASES

CASES

IN

CROWN LAW,

DETERMINED BY THE JUDGES,

FROM THE

FOURTH YEAR OF GEORGE THE SECOND

TO THE

PRESENT TIME.

Haſſel's Caſe.

CASE I.

AT the Old Bailey on Friday 16 October, 1730, *Thomas Haſſel* was tried before Lord Chief Juſtice *Raymond*, preſent Mr. Juſtice *Denton*, and Mr. Baron *Comyns*, on 2 Geo. 2. c. 25. ſ. 3. and 12 Ann. c. 7. for ſtealing a bank-note of 50l. the property of *John Arden*, in the dwelling-houſe of *Edward Carteret* and *Edward Harriſon*, Eſqrs.

It is felony in a ſervant of the Poſt-Office to ſteal *one ſingle* bank note from a letter committed to his care.

It appeared on the evidence, that the gentlemen in whoſe dwelling-houſe the felony was committed were the Poſt-maſters-general, and that the priſoner was employed, by them, in the Poſt-office, in the capacity of a ſorter of letters: That the bank-note had been ſent by the poſt, in a letter

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letter from *John Arden* of Mancheſter, directed to Mr. *Bury* in London, and that the priſoner had received the money for it from the Bank, by the hands of one *Mitton*, a ticket-porter, the day after that on which the letter would arrive in town by the regular courſe of poſt.

Before the priſoner entered on his defence, his Counſel, Mr. Serjeant *Daniel* and Mr. *Strange*, ſubmitted two objections to the conſideration of the Court.—Firſt, that the evidence, admitting it to be true, only proved that the priſoner was guilty of an embezzlement and breach of truſt, and not of larceny, within the true and legal definition of that crime.—Secondly, admitting that the taking was ſufficient to ſatisfy the legal notion of larceny, yet the ſubject of it was not within the terms or intention of this Act of Parliament.

Upon the firſt point they argued, that the priſoner, from the nature of his office, and the extent of the truſt repoſed in him, was, by the circumſtances of this caſe, diſcharged from all criminal reſponſibility. He was employed at the General Poſt-office as a ſorter of letters, and had accordingly given ſecurity, to a very conſiderable amount, for the faithful performance of his duty. The mails contain many bags, and each bag a great number of letters, and upon their arrival at the Office, they are immediately delivered into the cuſtody of the ſorters, whoſe buſineſs it is to arrange them according to their reſpective directions, for the purpoſe of their being afterwards delivered. This delivery gives the ſorters an entire poſſeſſion, upon a truſt that they will not violate the confidence repoſed in them; for whoever ſends letters by the hands of others, repoſes in the integrity of thoſe into whoſe hands they are committed; and if any miſtake or abuſe happens,

pens, although it may amount to a high and aggravated misdemeanor, and although they or their securities may be civilly liable for the amount of the loss, yet it is no felony. This distinction is so completely established by the known rules of the Common Law, that it would be trifling with the time of the Court to cite precedents in support of it. And the Legislature have themselves acted upon and confirmed this rule of Law; for by the 9 Ann. c. 10. s. 40. they have expressly provided for this offence, by inflicting a penalty of 20l. with incapacity of office, upon any person who shall presume wittingly, willingly, and knowingly, to open or detain any letter after its delivery at the Post-office, and before its delivery to the person to whom it is directed, without an order under the hand of the Secretary of State. It is apparent, therefore, that this penalty was all the punishment the law intended to inflict upon this offence; for it cannot be contended, that the prisoner is within the 21 Hen. 8. c. 7. which makes it felony for servants to rob their masters, for that Act requires that the master should be the owner of the goods, and it is clear that the prisoner was not servant to the owner of the note. It indeed furnishes a strong argument that servants entrusted with their masters' goods were not guilty of felony by the common law for taking them away *.

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Dalt. 102. Dyer, 5. 1 Hale, 667. 1 Hawk. 138.

Upon the second point, supposing that the prisoner had a bare charge of the property only, and

* See 5 Geo. 3. c. 25. §. 17. and 7 Geo. 3. c. 50. by which it is felony, without clergy, for any porter or other servant of the Post-office to secrete, embezzle, or destroy any letter containing a bank-note, or other security, therein mentioned. Upon these statutes *Richard Clay* was indicted at the assizes for York, as a servant to the Post-office, for embezzling a letter containing a bill of exchange. It was objected, that as he had not taken the oath required by 9 Ann. c. 10. s. 17. and 41. he could not be considered as a legal servant to the Post-office; but the Court over-ruled the objection.

not

HASSEL'S CASE.

not the poſſeſſion of it, yet it is not an offence within the Act. The ſtatute of 2 Geo. 2. c. 25. §. 3. enacts, that "whoever ſhall ſteal or take "by robbery any Exchequer orders, or tallies or "other order entitling any other perſon to any "annuity or ſhare in any parliamentary fund; or "any Exchequer bills, *bank-notes*, South-Sea "bonds, Eaſt-India bonds, dividend-warrants, "&c. &c. ſhall be deemed guilty of felony;" and ſo goes on enumerating other ſpecies of property, all of them in the *plural number;* whereas the fact charged in the indictment is for ſtealing *one ſingle* bank-note. Penal Acts are to be conſtrued with great ſtrictneſs, and cannot be made to affect the life, liberty, or property of the ſubject, but according to their literal import. In the preſent caſe, it is highly probable, that the Legiſlature did not intend to take away life for ſtealing only *one* of the ſecurities which the Act deſcribes. The 1 Edw. 6. c. 12. §. 10. made it felony, without clergy, to "ſteal horſes, "geldings, or mares," in the plural number; it was doubtful whether this could extend to the ſtealing of one horſe only, and the Legiſlature thought it proper to paſs another Act to ſupply this defect.

2 Haw. 499.

(*a*) Created Lord Hardwicke in 1733; appointed Chancellor 1737; created Viſcount Royſton and Earl of Hardwicke in 1754.

Sir *Philip Yorke* (*a*), Attorney-General, anſwered theſe objections on the part of the Crown.

3 Hen. 7. 12. 4. Hen. 7. 14. 3 Inſt. 108. 1 Hale c. 505. 1 Hawk. 36.

Firſt.—This offence is clearly felony, and not merely breach of truſt; for the priſoner had no property in the bank-note, but a bare charge only over the letter in which it was contained, to ſort and put it in its proper place. It is therefore like the caſe of a butler who has a charge over plate; or of a ſhepherd who has a flock of ſheep committed to his care; or of a weaver who has ſilk delivered to him by the throwſter to work; and in all theſe caſes it has been decided

that it is felony to ſteal any of the goods ſo delivered, notwithſtanding the delivery. But admitting, for a moment, that the priſoner had a poſſeſſory property in the letter, in the ſame manner, as it is ſaid, a carrier has who has goods delivered to him to carry, yet ſtill he would be guilty of felony; for by opening the letter the privity was determined; and it has accordingly been adjudged, that if a pack of goods, or a ton of wine, be delivered to a carrier, and he open them, and take out part of the goods or wine, he is guilty of felony: but I inſiſt, that a carrier has no ſuch poſſeſſory property by the delivery of goods, as will in any caſe excuſe him from the guilt of felony, if he feloniouſly converts them to his own uſe. HASSEL.'s CASE. 13 Edw. 4. 9 S P C 25. Kely, 35. 1 Hawk. 135.

As to the ſecond objection, I will readily admit, that penal ſtatutes ought to receive a ſtrict conſtruction; but they alſo muſt be conſtrued reaſonably, according to the common ſenſe of mankind, and the apparent intention of the Legiſlature. That the preſent ſtatute extends to one note as well as to many, is, in my apprehenſion, very plain and apparent. The words are, "whoever ſhall feloniouſly ſteal any *notes*," &c. "and then it goes on to ſay, "notwithſtanding "any of theſe particulars may be termed in law "*a choſe in action*;" which plainly ſhews, that it was the intention of the Legiſlature to make the ſtealing of *a choſe in action*, which one ſingle bank-note is, felony. It would be a moſt unreaſonable conſtruction to ſay, that the Legiſlature intended to make it felony to ſteal *two* notes of five pounds each, and yet that it ſhould not be felony to ſteal *one* note of ten thouſand pounds. As to the argument that has been drawn from the 1 Edw. 6. c. 12. §. 10. and the 2 and 3 Edw. 6. c. 33. the words were, "horſes, mares, "geldings," and *not* any horſes, mares, or geldings,

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ings, as is expreſſed in this ſtatute; and yet there it was only *doubted* whether it did extend to *one* horſe, &c. The 2 and 3 Edw. 6. c. 33. therefore only *declared*, that the ſtealing of one horſe ſhould exclude the felon from the benefit of clergy; which ſhewed that the Parliament only gave their judgment that it was felony without clergy by virtue of the firſt Act, the ſecond being only to remove doubts, and not to make a new law. By 22 and 23 Car. 2. c. 7. it is made felony to burn *any ricks or ſtacks* of corn, &c. in the night-time; and yet it has never been doubted, becauſe this is expreſſed in the plural number, but that the burning of *one barn*, &c. was felony within the ſtatute.

The Court, after conſulting upon the ſubject, declared that it was their clear and unanimous opinion, that there was nothing in either of the objections; but that the offence, if the Jury believed the witneſſes for the King, was clearly felony without the benefit of clergy.

The priſoner was accordingly put on his defence, and he called ſeveral witneſſes, who eſtabliſhed a probable *alibi*; upon which he was acquitted.

CASE 2.

Rex *verſus* Hodgſon and others.

Accidental homicide may be murder, if it happen in the proſecution of an illegal act.

THIS was a ſpecial verdict upon an indictment for MURDER found at the Seſſion-Houſe in the Old-Bailey, to the following effect.

The priſoners, together with ſeveral others, were hired by one J. S. to aſſiſt him in carrying away his houſehold-furniture, in order to avoid its being diſtrained for rent. They accordingly aſſembled for this purpoſe, armed with bludgeons and

and other offenſive weapons. The landlord of the houſe, accompanied on his part by another ſet of men, came to prevent the removal of the goods, and a violent affray enſued. The conſtable was called in, and he produced his authority, but could not induce them to diſperſe. While they were fighting in the ſtreet, one of the company, to the jurors unknown, killed a boy who was ſtanding at his father's door looking on, but totally unconcerned in the affray. HODGSON'S CASE.

The queſtion was, Whether this was murder in all the company?

In order to avoid the expence which attends the drawing up and arguing a ſpecial verdict, the Counſel agreed to ſubmit the point to the conſideration of the Judges in the ſhape of a reſerved caſe.

The Judges accordingly met; and the two Chief Juſtices were of opinion, that it was murder in all the company, becauſe they were all engaged in an unlawful act, by proceeding in the affray after the conſtable had interpoſed, and commanded them to keep the peace, eſpecially as the manner in which they originally aſſembled, viz. with offenſive weapons and in a riotous manner, was contrary to law, though the purpoſe for which they aſſembled, viz. to carry away the goods, was juſtifiable; and cited *Stamf.* 17. 40. *Fitz. Cor.* 350. *Cromp.* 244. 2 *Hawk.* 442. where divers go to commit a *diſſeiſin*, and one of them kill a man, the reſt are principal felons. But the majority of the Judges held, that as the boy was found to be unconcerned in the affray, his having been killed by one of the company could not poſſibly affect the reſt; for the homicide did not happen in proſecution of the illegal act; and therefore the perſons, though conſtructively preſent, could not be ſaid to be aiding and abetting

1 Hale, 437, 463, 534. Moor, 86. Compton, 34. 1 And. 116. 2 Hale, 344.

HODGSON'S CASE.

ting(*a*) the death of one who was totally unconcerned in the deſign for which the parties had aſſembled. And they cited *Plummer's Caſe*, *Kely*, 3. and two caſes before Lord Chief Juſtice *Holt*, the one at *Hertford*, and the other at *Sarum* aſſizes (*b*).

(*a*) Kely, 70. 1 Hale, 438. 4 Burr. 2073. Strange, 1015.

(*b*) Theſe two Caſes are meſtioned by Mr. Juſtice Foſter, 3. Diſc. p. 353. See alſo Kielway, 161. and Borthwick's Caſe, Douglas, 202.

CASE 3.

Innis's Caſe.

There are no principals in the ſecond degree in privately ſtealing from the perſon.

AT the Old Bailey April Seſſion 1731, *Henry Baynes*, *Suſan Thompſon*, *Hannah Randal*, and *Thomas Blower*, were indicted on 8 Eliz. c. 5. before Lord Chief Juſtice *Raymond*, preſent Mr. Baron *Comyns*, Mr. Juſtice *Denton*, and the Honourable Mr. Baron *Thompſon*, Recorder, for privately ſtealing a bank-note of 100l. payable to William Lord Malton, or bearer, from the perſon of *John Innis*.

Upon the evidence it appeared, that the note was loſt during a drunken ſcuffle at the Prince William Tavern, Charing-croſs, and it became impoſſible to aſcertain which, if any, of the priſoners had ſtolen this note.

1 And. 195. Dyer, 99, 183. 1 Hale, 529. 2 Hawk. 444, 480, 481, 489. Foſter, 355, 358.

The Court.—The ſtatute upon which this indictment is founded takes away the benefit of clergy from thoſe who ſhall be *found guilty* of privately ſtealing from the perſon; and as it is totally ſilent reſpecting aiders and abettors, it muſt be conſtrued to extend only to principals in the firſt degree. It follows, therefore, that the hand alone which takes

takes the property can be guilty of the offence; and as it is uncertain which of the priſoners took the note, it is impoſſible to find any of them guilty of the capital charge. *(a)*

RUSSEL'S CASE.

Ruſſel's Caſe.

CASE 4.

AT the Old Bailey, February Seſſion 1737, *William Ruſſel* was indicted before Mr. Juſtice *Page*, preſent Mr. Baron *Carter*, and *Simon Urlin*, Eſq. Deputy-Recorder, on the 2 Geo. 2. c. 25. for forging an acquittance and receipt under a certain account, in the words and figures following:

A receipt to a caſh memorandum is not within the 2 Geo. c. 25.

" Guinen *againſt* Bancillion.

" Bill £. 23 : 4 : 1, *viz.* £. 12 : 10 : 5, and £. 10 : 13 : 8.
" Half profit, £. 5 : 10 : 6.
" Coſts out of purſe, 12 : 10 : 5,
" My dividend, £. 5 : 6 : 10, } £. 17 : 17 : 3.
" Received £. 4 : 4. Due to me £. 13 : 13 : 3.

" RECEIVED *the above contents*,
" R. GATELEY,"

with intent to defraud *Roger Gateley*, one of the Solicitors of the High Court of Chancery.

The Counſel for the priſoner obſerved, that neither Mr. *Gateley*'s teſtimony, nor any affidavits made in his name, could be admitted in evidence,

(*a*) At the Old Bailey in September Seſſion in 1787, *Henry Sterne* was tried on this ſtatute, before *James Adair*, Eſq. Recorder (preſent Mr. Juſtice *Groſe*, and Mr. Baron *Thompſon*) for privately ſtealing a *Badge* called a GEORGE, from the perſon of his Grace the Duke of Beaufort. The property was found upon the priſoner, but it appeared that he had an accomplice, and it was uncertain which of them had taken it. The Court informed the Jury, that the conſtruction of this Act had always been, that the hand *alone* which takes the goods is guilty of the private ſtealing, and the priſoner was accordingly acquitted of the capital part of the charge.

RUSSEL'S CASE.

for that it was determined in the caſe of the *King* v. *Whiting (a)* by Lord Chief Juſtice *Holt*, that where a perſon is concerned in intereſt, he cannot be a witneſs.

(a) Salk. 283. Holt. 755. Ld. Ray. 396. Stra. 129, 728.

On the part of the proſecution it was contended, that *Gateley*'s evidence was admiſſible, for it went to eſtabliſh the defendant's guilt, and an immediate forfeiture to the Crown of all the property he poſſeſſed, would unavoidably follow his conviction; ſo that *Gateley*'s evidence tended to deprive himſelf of the poſſibility of ever receiving ſatisfaction for the ſum due to him upon this account. The objection of incompetency ariſes from the ſort of intereſt which the witneſs may have in the nature of the queſtion, or the event of the trial; and if any advantage may accrue to him from giving his teſtimony, the law, in conſideration of the frailty of the human mind, renders his evidence inadmiſſible. But when the effect of a teſtimony tends to deprive the witneſs of a ſubſtantial benefit, the law allows his evidence upon the conception that he will not untruly charge himſelf, or ſay any thing wrongfully to his own diſadvantage *(a)*.

(a) See Newland's Caſe, poſtea, and 2 Hawk. 611. 4 Burr. 2256. 5 Wils. 262. 1 Term. Rep. 153.

The Court were of opinion, that Mr. *Gateley* was not an admiſſible witneſs. They were alſo of opinion, that the inſtrument charged to be forged was not *a receipt or acquittance for money*, within the meaning of the Act of Parliament; they conſidered it as a confuſed *memorandum*, from which it was impoſſible to collect, with any certainty, whether the word *received* referred to the *item* of *coſts* or to any of the immaterial *items* of which the note was formed.

It alſo appeared, that the indictment was defective in not having properly purſued the words of the ſtatute; and for theſe cauſes the defendant was acquitted.

Frith's

Frith's Caſe.

CASE 5.

AT the Old Bailey, October Seſſion 1738, *Edward Frith* was indicted before Lord Chief Juſtice *Lee*, (preſent Lord Chief Juſtice *Willes*, and Serjeant *Urlin*, Deputy Recorder) on 5 Geo. 2. c. 29. ſ. 8. for that he being indebted to *George Hatfielde* in the ſum of 100l. became a Bankrupt; and a commiſſion of bankruptcy being *awarded* againſt him, he was by the Commiſſioners declared a Bankrupt, and notice in writing was left at his dwelling-houſe, that he had been declared a Bankrupt; and that he was required to ſurrender himſelf to the Commiſſioners, *at Guildhall*, and ſubmit to be examined, and to conform to the directions of the ſaid Act. And that afterwards notice was publiſhed in the *Gazette* for the ſaid *Edward Frith* to ſurrender himſelf, at Guildhall, and make a diſcloſure of his effects, &c. That afterwards Lord *Talbot*, then Lord High Chancellor, did enlarge the time for the ſaid *Edward Frith*'s ſurrendering and diſcovering his effects, for fifty days, to be computed, &c. That notice was given in the *Gazette*, that the Lord High Chancellor had enlarged the time for the ſaid *Edward Frith* to ſurrender, &c. and he, the ſaid *Edward Frith*, was therein required to ſurrender himſelf to be examined, &c. But he, the ſaid *Edward Frith*, lightly regarding the laws, &c. feloniouſly made default, and neglected to ſurrender himſelf to be examined, &c. againſt the form of the ſtatute.

An erroneous indictment againſt a Bankrupt for ſecreting his effects, refuſed to be quaſhed after the priſoner had pleaded.

Firſt notice.

Second notice.

Third notice.

The priſoner's Counſel raiſed four objections againſt the validity of this indictment.

FRITH'S CASE.

First Objection.—The ſtatute enacts, "That if "any perſon againſt whom a commiſſion of bank- "rupt hath been *awarded and iſſued out*, &c. ſhall "not, within forty-two days after notice thereof "in writing ſurrender, &c." the indictment there- fore ſhould have not only ſtated, that the commiſ- ſion was *awarded*, but that it had *duly iſſued;* for there is a material difference in the meaning of theſe words, the word *awarded* ſignifying the thing or- dered to be done, and the word *iſſued* ſignifying the thing done.

Second Objection.—The Act ſays, "That after "notice in the London Gazette, that ſuch com- "miſſion hath been iſſued, the Bankrupt ſhall "ſurrender himſelf to the Commiſſioners named "in the ſaid commiſſion, *or the major part of them;*" whereas in one of theſe notices ſtated in the indict- ment, they have ſpun out their directions for the priſoner to ſurrender to all the five Commiſſioners, leaving out the words *or the major part of them.*

Third Objection.—The Act ſays, "That the "Bankrupt ſhall have notice that ſuch commiſ- "ſion has iſſued, and of the time and place of a "meeting of the Commiſſioners *therein named*, "&c." But in the other notice they ſay, that he muſt ſurrender to three of them, without *naming* any of the reſt.

Fourth Objection.—That there ought to have been an averment in the indictment, that the Com- miſſioners did ſit, and that thoſe Commiſſioners ſhould have been named; whereas they were not named in their notice, and they had only ſet forth that he was required to ſurrender to *the Commiſ- ſioners at Guildhall*, which might as well be under- ſtood of the Commiſſioners of Sewers, or of the Lieutenancy, as of the Commiſſioners of Bank- rupts, for they all ſit at the ſame *Guildhall.*

The

The Court were of opinion, that all these objections were good, and the indictment consequently vicious. Upon which the prosecutor moved that the indictment might be quashed; but the Court said, it was by no means proper to encourage the quashing of indictments *after prisoners had pleaded (a)*. The motion was accordingly refused, and the prisoner being put upon his defence, an acquittal was entered.

FRITH'S CASE.

(a) 4 St. Tr. 232. 2 Hale, 295. 1 Vent. 69. 1 Hale, 35. Foster, 27.

Westbeer's Case.

CASE 6.

AT the Old Bailey, January Session 1739, *Thomas Westbeer* was indicted before Lord Chief Baron *Comyns*, and Mr. Justice *Chapple*, for stealing a parchment writing, *purporting* to be a COMMISSION, dated in the reign of Queen Anne, impowering the Commissioners therein named (pursuant to an order which had been previously made in Chancery, in a cause between Lord *Chesterfield* and *John Cantrell*, and others) to enter and ascertain the boundaries of the manors of *Bradbury* and *Hartsherne*, and to certify how high the water of *Furnace Pool* ought to be kept, &c. AND ALSO one other parchment writing, *purporting* to be a return made to the said commission. The property was laid to be the goods of our sovereign Lord *the King*, and of the value of *four shillings*.

A commission to settle the boundaries of a manor, is an instrument concerning the realty, and not the subject of larceny.

One *Curtis Lulham*, an accomplice, had made a full confession in writing, and given information upon oath against the prisoner, before Lord Chief Justice *Lee*, pursuant to 1 and 2 Phil. and

The information of a dead accomplice read in evidence against a prisoner.

WESTBEER'S CASE.

and Mary, c. 13. and 2 and 3 Phil. and Mary, c. 10; but before *Weſtbeer* could be brought to his trial, *Lulham*, the accomplice, died in priſon. The Attorney-General (*a*), after proving the fact of *Lulham*'s death, inſiſted upon reading his depoſitions made before the Chief Juſtice as evidence againſt the priſoner. Mr. Serjeant *Hayward* and Mr. *Barnardiſton* oppoſed their being read, and contended, that as *the act of God*, which the law ſays *ſhall not work an injury to any man*, had, by *Lulham*'s death, deprived the Crown of the opportunity of producing him *vivâ voce*, the admitting his depoſition to be read in evidence would *injure the priſoner*, inaſmuch as he would loſe the benefit which might otherwiſe have ariſen from a croſs examination. The Attorney (*a*) and Solicitor General (*b*) replied, and the point was very much debated (*c*). The COURT over-ruled the objection, and admitted *Lulham*'s information to be read; but they ſaid it would not be concluſive, unleſs it was ſtrongly corroborated by other teſtimony.

(*a*) Dudley Ryder, Eſq.

(*b*) John Strange, Eſq.

(*c*) Kelv, 55. 1 Lev. 180. Salk. 281. Cro. Eliz. 901. 2 Jones, 53 1 Hale, 305. 2 Keb. 19. 1 Hale, 284 Foſter, 337. 2 Hawk. 605.

The Court, upon hearing the evidence, expreſſed a doubt whether the offence amounted to a felony, and the Jury accordingly found a ſpecial verdict, "That the priſoner was *guilty* of pri-
"vately taking away a parchment writing, value
"*one penny*, from the records in the Court of
"Chancery, purporting to be a commiſſion un-
"der the broad ſeal; and another parchment
"writing annexed thereto, value *one penny*, pur-
"porting to be the return to the ſaid commiſſion,
"with intent to ſteal the ſame; that they were
"the goods of THE KING; and that the cauſe
"of which they were the records, was finally
"determined in the year 1717."

In

WEST-BEER'S CASE.

In Trinity Term 1740, this ſpecial verdict and the indictment were removed, by *certiorari*, into the King's Bench (*a*). Three objections were raiſed on the part of the priſoner: 1. That it was a falſe concluſion of the Jury that theſe parchments were the goods of the King. 2. That being records the indictment ought to have been on 8 Hen. 6. c. 12. which introduces an entire new law. 3. That they concerned the realty, and could not become the ſubjects of larceny, from their conſtructive adherence to, and connection with the freehold.

(*a*) Sir W. Lee, C. J. Sir F. Page, Sir W. Probyn, Sir W. Chapple, Juſtices.

This Caſe was argued twice at the Bar, but the two firſt points were very ſlightly ſpoken to, and not much relied upon. On the third point it was argued (*b*) on the part of the Crown, that theſe parchment writings were neither *chattels real*, nor *choſes in action*, and the only queſtion would be, whether they could be conſtrued to be *charters concerning the inheritance*. The reaſon given by Mr. Serjeant *Hawkins* (*a*) why a felony cannot be committed of theſe things is, becauſe, "being of no uſe but to the owner, they are not "ſuppoſed to be ſo much in danger of being ſto-"len, and therefore need not be provided for in "ſo ſtrict a manner as thoſe things which are of "a known price, and every body's money." But the preſent parchments are not of that deſcription, for the Jury have affixed ſuch a value to them as will make the offence *Petty Larceny*. For charters which concern the realty, the heir may bring his action; but for theſe records, no ſuch action will lie. The caſe in the YEAR BOOK 10 *Edw.* 4. *c.* 14. from which this diſtinction is drawn, ſays, felony cannot be of charters which concern the realty, becauſe they cannot be valued; but a value has been here affixed, and it is well

(*b*) By Mr. Attorney and Solicitor General.

(*a*) 1 Hawk. P. C. 142.

WEST-BEER'S CASE.

well known that for certain purpoſes old parchments will ſell for a conſiderable price. It is clear that the relation to the realty does not *alone* create the exception, for there is no doubt but it would be felony to ſteal *an heir loom*, and yet that favours of the realty.

It was admitted by the Counſel for the priſoner, that the parchment writings were neither *chattels real* nor *choſes in action*; but it was contended, that as they related to the boundaries of manors and the right of water, they were charters which concerned the realty; for what can affect the inheritance more than the right of water, and the boundaries of a manor? It is true, perhaps, that the heir could not maintain an action to recover them, becauſe they are of that nature which are called *nullius in bonis*, and every man has an equal right to reſort to them. They are in *the poſſeſſion of the Crown*, as being public records; but it does not follow from thence that they are *the property of the King*.

The Court gave no opinion whether theſe were properly laid to be the goods of the King, nor whether the Law as to this caſe was altered by 8 Hen. 6. c. 12. but they were unanimous that theſe parchment writings concerned the realty, and therefore the priſoner was NOT GUILTY of the felony charged in the indictment.

But a queſtion aroſe, whether he ſhould be diſcharged, or receive judgment as for a TRESPASS: He was accordingly remanded in order that this queſtion might be ſeriouſly conſidered. At another day Mr. Solicitor and Attorney General attempted to ſupport the affirmative, and cited the Year-Book, 2 *Hen.* 7. 10. and 22 *Cro. Car.*

2 Hawk. P. C. 625.

Car. 332. 29 *Cro. Jac.* 497. 1 *And.* 351. *Dalt.* 321. 2 *Hawk. P. C.* 625. But it was anſwered, that the priſoner would in this caſe loſe many advantages, to which if he were indicted for the miſdemeanor he would by law be entitled: He might have full Counſel, a copy of his indictment, and a ſpecial Jury. Beſides, the verdict doth not find the taking to have been *vi et armis*, and if the *felonicè* be taken away, no *treſpaſs* remains. WEST-BEER'S CASE.

The Court went into obſervations on the ſeveral caſes which had been cited on the part of the Crown; and ſhewed that they were repugnant to the rules of law and principles of juſtice. The priſoner was accordingly diſcharged.

John

CASE 7.

John Drinkwater's Caſe.

Quære, Whether a perſon who receives money as a reward for helping another to ſtolen goods can be proſecuted before the principal offender is convicted.
3 Inſt. 134.
S.P.C. 40.
1 Hale, 619.
2 Hale, 400.

AT the Old Bailey, October Seſſion 1740, *John Drinkwater* was indicted on the 4. Geo. 1. c. 11. ſ. 4. before Lord Chief Juſtice *Lee*, preſent Mr. Juſtice *Denton*.

The indictment ſtated, that *Catharine Kaylock*, a repeating watch, the goods of SACKVILLE *Earl of Thanet*, privately from the perſon of *William Lorton*, feloniouſly did ſteal, &c. AND THAT afterwards the ſaid *John Drinkwater* did feloniouſly receive and have eight guineas, as a reward for helping one *Nathaniel Delander* to the ſaid watch; he the ſaid *John Drinkwater* not having apprehended, or cauſed to be apprehended, the ſaid *Catharine Kaylock*, &c. againſt the form of the ſtatute.

It appeared from the opening, that the *Earl of Thanet* had ſent the watch to Mr. *Delander*, a watch-maker, to be repaired, who delivered it to *Lorton* his workman, from whom *Catharine Kaylock* privately ſtole it; and it was admitted, that *Catharine Kaylock*, the principal felon, was dead, and had never been convicted of this offence.

Before any evidence was given, the priſoner's Counſel ſubmitted to the Court, that this indictment could not be legally proſecuted. The act directs, that "whoever taketh money or reward, "directly or indirectly, under pretence, or upon "account, of helping any perſon to any ſto-"len goods, ſhall be guilty of felony, and "ſuffer the pains and penalties of felony, ac-"cording to the nature of the felony commit-

"ted

" ted in ſtealing ſuch goods; and in ſuch, " and the ſame manner as if ſuch offender had " himſelf ſtole ſuch goods, in the manner and " with ſuch circumſtances as the ſame were ſtolen." DRINKWATER'S CASE.

The puniſhment therefore to be inflicted upon an offender againſt this Act muſt be preciſely the ſame as that which the principal offender would have ſuffered on conviction. The crime charged againſt the principal by this indictment is privately ſtealing, which by the 8 Eliz. c. 4. is a capital offence; but the Jury might have acquitted her of the capital offence, and found her guilty of grand larceny, or, if they thought it proper, of petty larceny only. Theſe different ways of finding the verdict would have made an equal difference in the nature of the preſent caſe; and as the principal was found guilty of a capital offence, or of a grand larceny, or of petty larceny, ſo an offender againſt this Act, who ſtands exactly in the light of an acceſſary after the fact, ought to be indicted. It is impoſſible to know what kind of offence the priſoner has committed, until the conviction of the principal has aſcertained the nature and degree of *his* guilt; for the act expreſly requires the ſame judgment in this caſe, as ſhould be given againſt the firſt offender: but as the firſt offender has not been convicted, *non conſtat* where the crime was petty larceny, ſingle felony, or a capital offence. This caſe tallies exactly with the doctrines concerning principal and acceſſary. At the common law the receiving of ſtolen goods was not felony, but miſdemeanor only. It was made felony by a particular Act of Parliament, exactly as in the caſe now before the Court; and yet it was never known that an acceſſary was tried for *felony* till the principal had been convicted; and when the principal could not be found, the acceſſary could not be 1 Hawk 252.

DRINKWATERS CASE.

be indicted for the felony, but for the misdemeanor only.

On the part of the prosecution it was said, that if this objection was suffered to prevail, the whole effect of the Act would be frustrated; for it went the length of contending, that if the principal was even indicted, and died, or broke goal, at any time before trial, the offender must be discharged. This case has no analogy to the doctrine which prevails in the cases of principal and accessary; but if it had, it will be found that *Lord Hale* says(*a*), though the principal does not appear, yet the accessary may be put *to answer by way of defence*. And Mr. Serjeant *Hawkins* (*b*) says, that "notwithstanding the numerous authorities in the "old books (*c*), that an accessary shall not be compelled to answer before the principal has appeared and answered, the contrary opinion is settled "in a great measure at this day." But the present case is extremely distinct from the cases of principal and accessary. The fact charged upon the prisoner, in the present indictment, is an independent fact; and whether he is guilty of it or not, must be determined by the Jury on all the circumstances of the case. The statute says, he shall suffer pains and penalties, according to the nature of the felony committed; but it does not mention a word of the principal's being first convicted. It is therefore sufficient, if it be first proved that the watch was stolen, and then that the prisoner received the eight guineas to restore it. Suppose the charge had been upon that branch of the Act which makes it felony to take money *upon pretence* of helping another to stolen goods; in that case, though it might have been necessary to state that the goods had been stolen, and to have

(*a*) 1 Hale, 616, 623. 2 Hale, 203, 224.

(*b*) 2 vol. ch. 29 f. 45.

(*c*) 9 Hen. 6. 3. Sum. 222. F. Cor. 77. B. app. 28. S.P.C. 46

have proved that the larceny was committed, yet it cannot be imagined that it would be neceſſary previouſly to convict the thief, before the priſoner could be tried for the felony. In the caſe of *Jonathan Wild* (*a*), the principal felon was not convicted when *Wild* ſuffered; and all that has been held neceſſary upon theſe indictments, is to prove, by *witneſſes*, the guilt of the principal, before proof is adduced of the guilt of the priſoner. The production of the record of the conviction of the principal is not, in this caſe, neceſſary. The offence of the priſoner is certainly coupled to that of the principal; but if both parts of the indictment are proved by *vivâ voce* teſtimony, the Court can be under no difficulty what puniſhment to inflict.

DRINKWATER'S CASE.

(*a*) 10 Geo. 3.

The priſoner's Counſel replied, That it was impoſſible to prove guilt upon a dead body, which could not poſſibly be heard in its own defence. It is averred poſitively in the *indictment*, that Catharine Kaylock ſtole the watch; and if ſhe were alive, ſhe might produce evidence which would go to her acquittal; what puniſhment could *then* be inflicted on the priſoner? * This is apparently *caſus omiſſus* in the Act; but the Court will not ſupply that which the Legiſlature ought to have done. Death, in many inſtances, ſtops the arm of Public Juſtice, and diſables it from ſtriking at the evil it was raiſed to puniſh. As to the inſtance of taking money upon a *mere pretence* of

* Suppoſe *Catharine Kaylock* was alive, but not amenable to juſtice, and the priſoner was to be tried, convicted, and executed for the capital offence, and it was afterwards to turn out, on the trial of the principal, that ſhe was guilty of a tranſportable felony only, is it to be imagined that the Legiſlature could intend ſuch a poſſibility? And yet ſuch a caſe might happen, if the acceſſary was to be tried before the principal is convicted. *MS. note.*

reſtoring

DRINKWATER'S CASE.

reſtoring ſtolen goods, the indictment in ſuch a caſe muſt not only alledge that goods were ſtolen, but the particular manner of the ſtealing muſt be proved, and the record of the conviction of the principal be produced, before the priſoner could be convicted of the felony; though he might for the fraud or miſdemeanor. As to the citations from *Hale* and *Hawkins*, both thoſe authorities ſay the acceſſary may be put to *anſwer*, yet his trial is never proceeded on till the principal is convicted; and in *Jonathan Wild*'s caſe, the exceptions were never taken.

The Court conceived this to be a caſe of very great importance, and of the firſt impreſſion; and it was therefore reſerved for the opinion of the Judges. The priſoner was accordingly detained, and after remaining ſome time in goal he was diſcharged; but the opinion of the Judges upon this queſtion was never publicly communicated.

CASE 8.

Peter Parfait's Caſe.

On 7 Geo. 2. c. 22. there muſt be a *demand*, as well as an *aſſault*, to conſtitute the offence. See Haywood's caſe at the O.B. 1783, and Rock's caſe, October Seſſion, 1786.

AT the Old Bailey, December Seſſion 1740, *Peter Parfait* was indicted on 7 Geo. 2. c. 22. before Lord Chief Juſtice *Willes*, Mr. Juſtice *Chapple*, Mr. Baron *Carter*, and Sir *John Strange*, Knt. Recorder, for aſſaulting *Thomas Weſton* on the King's highway, with a piſtol, with an intent to rob him.

It appeared upon the evidence, that the proſecutor, a coachman, was driving his coach along the

the road leading to *Pancras*, and that the priſoner preſented a piſtol at him while he ſat on his box, and called out to him to ſtop; but it did not appear that he had made any demand of money. PARFAIT'S CASE.

The Court. This is not a caſe within the meaning of the Act of Parliament; for a demand of money or other property muſt be made to conſtitute this offence. A demand, however, may be made by action as well as ſpeech; as if a man who is deaf and dumb ſtop a carriage on the highway, and put his hat into the carriage with one hand, while he holds a piſtol *offenſively* in the other, or the like; but then the action muſt be plain, and unequivocally import a demand. In the preſent caſe no motion or offer to demand the proſecutor's property was made (*a*). 1 Hawk. 250.

(*a*) See the caſe of William Thomas O. B. July Seſſion 1764, before Mr. *Juſtice Aſhhurſt*, which confirms the law here laid down.

Robert Rhodes's Caſe.

CASE 9.

AT the Old Bailey, April Seſſion 1742, *Robert Rhodes* was indicted before Mr. Baron *Reynolds*, for forging a certain paper, partly written and partly printed, ſigned with the name of *John Thompſon*, purporting to be the laſt will and teſtament (*a*) of the ſaid *Thompſon*, a ſeaman, late on board his Majeſty's ſhip *Flamborough*, deceaſed.

On an indictment for forging a ſeaman's will, the muſter book of the Navy Office is good evidence to prove the identity of the ſuppoſed teſtator.

(*a*) See 2 Bl. Rep. 799, 797.

It appeared by the evidence of the Clerk of the Ticket-Office, in the Navy-Office, that it was cuſtomary for the Captains of Men of War to tranſmit accounts of their Crews to the Navy-Office as frequently as poſſible, and that theſe accounts are entered regularly in muſter-books, containing the names

RHODES'S CASE.

names of all who are living, dead, or have run away. The muſter-book belonging to the *Flamborough* was produced, in which there was this entry: "*John Thompſon*, an able ſeaman, died "22 Auguſt 1739, at Turtle Bay, on board the "*Flamborough*."

Firſt Point.—The priſoner's Counſel contended, that as the priſoner was charged with forging the will of *Thompſon*, it was incumbent on the proſecutor to prove, by the beſt evidence the nature of ſuch a fact would admit of, that the teſtator was dead; and that the beſt evidence of that fact was by ſome one of the many perſons who were on board the ſhip, and not by the accounts of the Captain or other Officers, who might by accident or deſign return the man dead, when he was really alive.

The Counſel for the proſecution anſwered, that the objection was incongruous on the part of the priſoner, for that he had actually proved the will in Doctors Commons, and received the wages at the Navy-Office, by virtue of the probate, which implied an acknowledgment by him that *Thompſon* was dead; but that, excluſive of that reaſon, it was the conſtant courſe and uninterrupted practice of the Court to admit the entry in the muſter-book, after it had been authenticated by the Clerk who ſigned it, as full evidence of the fact.

The Court over-ruled the objection, and cited the caſe of *Fitzgerald and Lee*, *in Mich. Term* 15 *Geo.* 2. where this point aroſe, and a muſter-book was admitted as evidence of the ſame kind of fact.

Second

RHODES'S CASE.

Second Point.—In the progreſs of the trial it appeared, that the will ſet out in the indictment, in which *the priſoner* was named executor, was dated the 6th of September, 1736, and that another will exiſted in the name of *Thompſon* (which was produced in Court) dated 7th March, 1737, in which one *Carter* was named executor.

An executor named in a ſubſequent will, by the ſame teſtator to that which is charged to be forged, is not a competent witneſs to prove the forgery.

Carter was called as a witneſs on the part of the proſecution to prove, that the will in which the priſoner was named executor, was not in the hand-writing of *Thompſon*, the ſuppoſed teſtator. The competency of his evidence was objected to on the ground of intereſt. To ſupport this objection, it was contended, that he ſtood in a ſimilar predicament with a man whoſe name is charged to be forged to a bond, note of hand, bill of exchange, or other ſecurity, and he is produced to prove that it is not his ſignature: in ſuch a caſe the law refuſes his evidence, becauſe it tends to deſtroy the validity of an inſtrument which affects his intereſt. In the preſent caſe there are two wills, *Carter* the witneſs claiming an intereſt as executor under one of them, and *Rhodes* the defendant claiming in the ſame way under the other. The evidence therefore of *Carter*, by diſproving *Rhodes*'s will, tends to confirm and eſtabliſh his own, and by this means to promote the intereſt which he claims.

Hard. 331. 2 Sid. 237. Salk. 283. Stra. 595, 728. 2 Hawk. 611.

On the part of the Crown it was anſwered, that an intereſt was not ſufficient to deſtroy the competency of the witneſs, unleſs it was of ſuch a nature as to be materially affected by the event of the trial. The inſtances of the drawer of a note or the obligor of a bond do not apply; for there the evidence tends to deſtroy a ſecurity upon which, if valid, the witneſs is immediately liable: but in

RHODES's CASE.

the preſent caſe there can be no queſtion which of the wills has the better title. For admit for a moment, that *Rhodes*'s will is in the hand-writing of the teſtator, yet it being anterior in point of date to that under which *Carter* claims, it can never be eſtabliſhed as the *laſt* will of *Thompſon;* ſo that the intereſt which *Carter* poſſeſſes does not in any degree depend upon the queſtion now before the Court, viz. Whether the will charged to be forged, and under which the priſoner claimed, be in fact real or fictitious? The acquittal or condemnation of the priſoner does not in any way affect *Carter*'s right to a probate; he is intitled to it, as executor of the *laſt will;* and his intereſt cannot be concerned in any event which may be produced by his teſtimony of the fact which he is called upon to prove.

See Doctor Dodd's and Newland's caſe poſt.

Salk. 283. Stra. 1043. 1104. Ld. Ray. 1229.

The Court were unanimouſly of opinion, that *Carter*'s teſtimony was not admiſſible.

CASE 10.

Brangan's Caſe.

A priſoner upon his acquittal is intitled *debito juſtitiæ* to a copy of the indictment.

AT the Old Bailey, September Seſſion 1740, *Patrick Brangan* and another were tried for a highway robbery, and acquitted. The proſecution appeared to have been brought merely for the purpoſes of vexation and oppreſſion; and the priſoner's Counſel applied to the Court for a copy of the indictment.

1 Bl. Rep. 385.

Lord Chief Juſtice *Willes*, who tried the priſoners, refuſed the application, only becauſe it was not

not neceſſary that he ſhould grant it. He acknowledged that the proſecution bore the ſtrongeſt marks of being unfounded and malicious; and declared, that by the laws of this realm every priſoner, upon his acquittal, had an undoubted right and title to a copy of the record of ſuch acquittal, for any uſe they might think fit to make of it; and that after a demand of it had been made, the proper officer might be puniſhed for refuſing to make it out *.

BRANGAN'S CASE.

* In 16 Car. 2. an order in writing was made by five Judges, that no copies of any indictment for felony ſhould be given at the Old Bailey without ſpecial order, upon motion made in open court, at the general gaol delivery—Kely, Rep. 3. and in May Seſſion 1739, this order was republiſhed by the direction of the Court.—The Court will not grant a copy of the indictment where the acquittal ariſes from the incompetency of a witneſs. Quick's Caſe, January Seſſion 1784; and ſee Bevan's Caſe, January Seſſion 1786.

John Waite's Caſe.

CASE 11.

AT the Old Bailey, February Seſſion 1743, *John Waite* was indicted before Mr. Baron *Reynolds* upon 2 Geo. 2. c. 25. ſ. 3. and 12 Anne, c. 7. for ſtealing on the 10th May, 1741, in a certain dwelling-houſe, wherein *Zerubbabel Crouch* and divers other perſons did dwell, ſix Eaſt India Bonds, of 100l. each, the property of the Governor and Company of the Bank of England.

It was not felony by the common law, for a Caſhier of the Bank to embezzle an India bond committed to his care, purſuant to the ſtatute 12 Geo. 1. c. 32. Ante Haſſel's Caſe, page 1. Bracton, 137. Britton, 14. Fleta, b. 1. c. 31. 2 Inſt. 315. 3 Inſt. 34. 2 Hale, 219. Kely, 10. 6 St. Tr 230. 2 Hawk. c. 28. ſ. 1. 4 Bl. Com. 312.

The priſoner, at the time of his arraignment, deſired that his irons might be taken off; but the Court informed him that they had no authority for that purpoſe until the Jury were charged to try him. He accordingly pleaded not guilty, and being

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being put upon his trial, the Court immediately ordered his fetters to be knocked off.

By the ſtatute of 12 Geo. 1. c. 32. the orders of the Court of Chancery are inforced, "That "Maſters in Chancery ſhall deliver into the Bank "of England the money, bonds, tallies, orders, "and effects of the ſuitors of the ſaid Court, un- "der their reſpective care and direction; that the "Bank ſhall receive all intereſt due upon ſuch "ſecurities; and that upon paying in ſuch money, "bonds, tallies, orders, &c. the Maſter ſhall take "a certificate thereof from one of the Caſhiers."

It appeared that the priſoner was a Caſhier of the Bank; that in the year 1736, there being a great number of Eaſt India Bonds in the cuſtody of the Bank, and the Eaſt India Company reſolving to reduce the intereſt, it became neceſſary to apply to the Court of Chancery to have the bonds taken out of their vaults, and exchanged for the Company's new bonds; that the priſoner, as Caſhier, received ſeveral of theſe new bonds, and gave receipts for them; that on the 21ſt April, the Court of Chancery, in the cauſe of *Broome* v. *Broome*, ordered the ſeventeen bonds which were in the Bank to be delivered out; and ſeventeen bonds were accordingly delivered by the priſoner to the bearer of the order. Upon inſpection they were found not to be the identical bonds which were deſcribed in the cauſe. An application was therefore made to the Directors, that the right bonds might be ſearched for, and delivered. Directions were accordingly given for this purpoſe to the priſoner, who kept the key of the cheſt in which they were depoſited in the vault; but inſtead of ſo doing he took an opportunity of going away.

away. His ſlight created ſuſpicion, and upon opening his deſk two India Bonds were found, which had a little time before been brought in by order of the Court of Chancery. Upon further inſpection it was found that the bonds belonging to the cauſe of *Broome v. Broome* were taken away; and it was proved, that the priſoner had carried ſix of *them* to a Broker, who ſold them for the priſoner's account, and paid him the produce. WAITE'S CASE.

Wynne, Agar, Kettleby, and Hayward, *Serjeants*, contended in favour of the priſoner, that he was not guilty of felony, within the meaning of the Act of Parliament on which the indictment was founded. The 2 Geo. 2. c. 25. ſ. 3. enacts, "That if any perſon or perſons ſhall *ſteal, or take* "*by robbery*, any of the ſecurities mentioned in "the Act, notwithſtanding any of the ſaid parti- "culars are termed in law *a choſe in action*, it ſhall "be deemed and conſtrued to be a felony of *the* "*ſame nature, and in the ſame degree*, as it would "have been if the offender had ſtolen, or taken "by robbery, any other goods of the like value, "with the money due on ſuch ſecurities, &c." It is evident from the words of this Act, that the Legiſlature did not intend to alter the nature of the offence of larceny, as it ſtands upon the grounds and principles of the Common Law; but only meant to introduce a new ſpecies of property as the ſubject of felony, the ſtealing, or the taking of which by robbery is puniſhable in the ſame degree and manner as if the offender had taken goods or money to the ſame amount. It cannot be pretended that the taking imputed to the priſoner was by robbery, for that requires force; if therefore he has been guilty of any crime within this ſtatute, it muſt be that of ſimple grand larceny. The facts

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facts are, that the priſoner was Caſhier or ſervant to the Directors of the Bank, and has given ſecurity to them, not merely to anſwer for any accidental occurrence or misfortune, but generally, for the faithful performance of the truſts repoſed in him. A ſpecial property in theſe India Bonds undoubtedly reſides with the Governor and Company of the Bank of England; but the Directors had committed them to the cuſtody and controul of the priſoner, as their Caſhier, under a confidence that he would not betray his truſt, and this truſt is in ſome meaſure directed by the Legiſlature itſelf; for by the 12 Geo. 1. c. 32. it is a Caſhier alone who can give a receipt for the bonds paid in by the Court of Chancery. Now by the rules of the Common Law, where property is delivered to the cuſtody and poſſeſſion of another *in truſt*, he cannot be guilty of felony in taking it away. He may abuſe the confidence repoſed in him, by converting the property to his own uſe, but this ſubſequent act cannot alter the nature of the original contract. Many authorities might be produced to confirm this poſition. It has been univerſally admitted, that if a carrier goes away with goods *entruſted to him*, and ſells them, it is not felony. 3 *Inſt.* 102. 1 *Hale*, 504. 13 *Edw.* 4. 9 *Staund.* 25. *Kely*, 35. 1 *Roll. Abr.* 73. But it may be ſaid, that although the priſoner had the poſſeſſion of *all* the bonds, yet he had not poſſeſſion of *any part*, and therefore could not ſeparate thoſe mentioned in the indictment from the reſt; and certainly the ancient caſes afford a diſtinction upon this point: for it is ſaid, if the carrier break open the package, and ſell part of the goods, he is guilty of felony. *Dalton*, c. 102. 1 *Hawk.* c. 33. ſ. 5. But in that caſe, the thing committed to his care is ſingle and entire; in the preſent caſe, each bond is diſtinct

and

and ſeparate. The property muſt be taken from *the poſſeſſion* of the owner. If a man delivers or lends a horſe to another, and he rides away with it, it is not felony. *Co. Pl. Crown*, 107. *Butler's Caſe*, and 1 *Hale*, 504. This is a caſe common in all the books, and we rely ſtrongly upon it. Suppoſe a man goes to an inn-keeper, under pretence of chaffering for a horſe, and when he has got upon his back rides away with it, this is not felony. 1 *Hale*, 504, 667. 1 *Hawk.* 89. *Summary*, 61 (*a*). This law is confirmed by 21 *Hen.* 8. c. 7. which makes it felony where a ſervant takes a horſe without the leave of his maſter, and rides away with it. 3 *Hen.* 7. 126. 1 *Hale*, 505. and this proves, that it would not be ſo conſidered in the caſe of a common perſon. The priſoner was as much entruſted with theſe India Bonds by the Directors of the Bank, as the Governor and Company themſelves were by the Court of Chancery. They always remained with the priſoner, and he, by *his receipt*, is liable and anſwerable. But his miſapplication of them cannot be conſtrued felony; for no man can be guilty of ſtealing that which he has in his own poſſeſſion; and it is clear from his receipt that he did not come by them tortiouſly. They were legally in his cuſtody; he was truſtee to the Company for their amount, and is anſwerable in a civil action for their value. Suppoſe for a moment that a body corporate could be guilty of felony, and that the Directors had embezzled theſe bonds, could they have been charged criminally for ſuch an act? Certainly not; but they would have been obliged to make ſatisfaction to the ſuitor to whom they might eventually belong: and upon what ſolid ground, in this caſe, can any diſtinction be made, with

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(*a*) Vide poſt. The King v. Pares contra.

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with reſpect to perſons? The priſoner had a ſpecial property in the bonds, and might have maintained trover to recover them. They came to his poſſeſſion by actual, and not conſtructive delivery only; and it has lately been determined by the King's Bench, upon a ſpecial verdict out of this Court, that ſtealing Chancery Records, by taking them out of the office, and ſelling them, is not felony (*a*). But if theſe arguments, founded on the doctrines of the Common Law, ſhould be thought lame or impotent, there is, ſubſequent to the period at which this offence is charged to have been committed, a legiſlative declaration of the law, deciſive in favour of the priſoner; for by 15 Geo. 2. c. 13. ſ. 12. it is enacted, "That if "any officer or ſervant of the Bank of England, "being entruſted with any note, bill, dividend, "warrant, *bond*, deed, or any ſecurity, money, "or other effects belonging to the ſaid Company; "or having any of the ſaid ſecurities *lodged* or *de-* "*poſited* with the ſaid Company, or with him, "as an officer or ſervant of the ſaid Company, "ſhall ſecrete, embezzle, or run away with the "ſame, or with any part thereof, he ſhall ſuffer "death without benefit of clergy." This clauſe clearly proves, that the offence with which the priſoner is charged was not before a felony; and as the Act has paſſed long ſince *the time* laid in the indictment, and does not contain any retroſpective words to give it an *ex poſt facto* operation, we humbly conclude that the priſoner muſt be diſcharged.

(*a*) This caſe was determined on a different point. Vide ante, p. 17.

Sir *John Strange*, Knight, *Solicitor-General*, Mr. *Bootle*, and Mr. *Purchas*, on the part of the Crown. By the ſtatute 12 Geo. 1. c. 32. the Bank of England are made expreſly liable for theſe

theſe bonds, after the certificate has been given by a Caſhier, as the Act directs. In the preſent caſe the bonds were carried from the Court of Chancery to the Bank; and as that corporation muſt have proper ſervants to tranſact the different branches of their very extenſive and important concerns, the priſoner at the bar was the proper perſon to receive them from the Accomptant-General. The moment the priſoner received them, that moment they came into the poſſeſſion of the Bank, and not into the legal poſſeſſion of the priſoner. The receipt which he gave for them proves that it was not for himſelf; for it expreſſes, that they were received *for the Governor and Company of the Bank of England*; and it is immaterial whether the bonds are under their own lock and key, or under the lock and key of their ſervants and Caſhiers; for in conſideration of law the property is in the poſſeſſion of the Bank. His receipt will not intitle the ſuitors to call upon *him* for the money, for it is virtually the receipt of the Company. It is ſaid that a man cannot ſteal from himſelf, and if it be taken abſtractedly, the aſſertion is certainly true; but it is equally certain that a man may commit a felony of what he has in his own poſſeſſion. The caſe in *Lord Hale*, 504, 505. will prove this: A carrier receives goods to carry to Dover, and he carries them away, it is no felony; but if, having carried them to the place appointed, he afterwards ſecretly takes them away *animo furandi*, it is felony; for the poſſeſſion which was imparted to him from the owner being determined by the delivery, his ſubſequent taking is in all reſpects the ſame as if it had been done by a ſtranger, 13 *Edw.* 4. 9 *Co. P. C.* 107. So in the preſent caſe, the moment the bonds are depoſited in the vault, that

WAITE'S CASE. that moment the priſoner's poſſeſſion, if ever he had any, ends. If a carrier in his journey unpack goods, and take any thing out of a caſe, box, or pack, it will be a felonious taking, for he had no authority to ſeparate the goods; his authority was to receive the bundle entire, and to deliver it entire, at ſuch a place. *Vide* 21 *Hen.* 7. *pl.* 14. Let us compare the caſes: Twenty India bonds are delivered at one time to the priſoner, and he converts three of them to his own uſe: Is he not in the ſame caſe with the carrier, who takes part of the goods out of a parcel, and does not deliver them to the party they are for? Is not this evidence to the Jury of a felonious taking?

The Gentlemen have put a caſe, that if a man goes to an inn to hire a horſe, and gets upon its back, and rides away with it, it is not felony; but this is not law, for the horſe is not *lent* in this caſe, and therefore it muſt be felony (*a*). There is a difference between having the care of goods and the legal poſſeſſion of them. In the preſent caſe the priſoner had the care of the bonds, but not the legal poſſeſſion; and it cannot now be controverted, that thoſe who have a bare charge only, may be guilty of felony. *Serjeant Hawkins*, in his Pleas of the Crown, *Bk.* 1. *c.* 33. *ſ.* 6. ſays, "That one "who has *the bare charge*, or the *ſpecial care* of "goods, but not *the poſſeſſion* of them; as a ſhepherd who looks after ſheep, or a butler who "takes care of plate, or a ſervant who keeps the "key of my chamber, or a gueſt who has a "piece of plate ſet before him at an inn; may "be guilty of felony in fraudulently taking away "the ſame: for in all theſe caſes the offence may "as properly come under the word *cepit*; the "injury to the owner is as great, and the fraud as "ſecret,

(*a*) Vide the King v. Pares, poſt.

2 Hen. 7. 12.
21 Hen. 7. 14.
B. Cor. 58. 137.
S. P. C. 25.
Moor, 246.
Yelv. 84.
1 Hale, 505.

" ſecret, and the villany more baſe than if it had " been done by a ſtranger." The circumſtances under which the priſoner had the management of theſe bonds, prove that he had a bare charge only, much more forcibly than the caſes of either the butler, the ſhepherd, the ſervant, or the gueſt; for the bonds remain in the cuſtody of the Caſhier only until the Directors go down to put them into the vault, and then the Caſhier attends to lock them up in the ſight of the Directors. But ſuppoſe, from the circumſtance of the Caſhier keeping the key of the cheſt, it ſhould be conſidered as a ſort of *mixed poſſeſſion*, the conſtruction of law is, that the true poſſeſſion is in him who is the owner or maſter of the goods. If an apprentice, ſays *Lord Hale*, 506. embezzle his maſter's goods or money out of his ſhop, he is guilty of felony, notwithſtanding the poſſeſſion which he has by a licence to ſell. The charge which the priſoner had in theſe bonds was only for *the ſpecial purpoſe* of receiving the intereſt; he is the hand only to convey them to the proper repoſitory, and from thence to receive the intereſt, and be again depoſited, as occaſion may require. There is a caſe made uſe of by *Lord Dyer*, *folio* 5. " That if a " maſter delivers to a ſervant one-and-twenty " ſhillings in ſilver, to change into gold, or to " buy leather to make ſhoes, and he runs away " with the gold or the leather, it is felony, be- " cauſe the money was delivered for *a particular* " *purpoſe*." So in this caſe, theſe bonds were delivered to Mr. *Waite* for the particular purpoſe of depoſiting them in the cheſt, and receiving the intereſt; not to ſell them, and convert their produce to his own uſe. The ſtatute of 15 Geo. 2. c. 13. ſ. 12. has been adduced to prove that the priſoner's offence is not felony by the Common Law. WAITE'S CASE.

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Law. If he was one of the deſcription of perſons whoſe acts of infidelity the Legiſlature have thereby made felonious, and the Act could be conſidered as introductory of a new law, the argument would certainly be concluſive: but we contend that this man had not that ſort of truſt, againſt the breach of which the Act was intended to guard; and there are many ſtatutes which are made to put an end to fancied doubts. That act only takes away, *ſub modo*, the benefit of clergy from the offence of larceny, in the ſame manner as the 1 Jac. 1. c. 8. takes away clergy from a particular kind of man-ſlaughter; but it has never been doubted but that the mode of killing therein mentioned was man-ſlaughter before the Act. The 12 Anne, c. 7. removes the benefit of clergy from larceny in a dwelling-houſe to the value of 40s. but it was undoubtedly a felony to ſteal to that amount, either within or out of a dwelling-houſe, before that Act.

See Haſſel's caſe, ante, p. 5.

The Court were clearly of opinion, That the priſoner's offence was not felony before the 15 Geo. 2. c. 13. ſ. 12. and they offered *Mr Solicitor-General* A SPECIAL VERDICT; but the Counſel for the proſecution candidly acknowledged they were perfectly ſatisfied with the opinion of the Court; and the Jury were accordingly directed to find the priſoner *Not Guilty*.

A motion was then made for leave to charge the priſoner with *a Civil Action*; which being granted, he was accordingly charged, at the ſuit of the Bank, with a debt of *thirteen thouſand three hundred pounds*.

Comer's

Comer's Caſe.

CASE II.

THE Indictment ſtated, "That *John Comer*, "on the 23d April, 17 Geo. 2. about the "hour of one in the night, the dwelling-houſe "of *Bridget Berridge*, Spinſter, feloniouſly and "burglariouſly did break and enter, and one "diamond necklace, of the value of 150l. the "goods and chattels of the ſaid *Bridget Berridge*, "in the ſaid dwelling-houſe, then and there "being found, then and there feloniouſly and "burglariouſly did ſteal, take, and carry away, "*&c.*"

When the *felony* is laid to conſtitute the *burglary*, an acquittal of the burglary is an acquittal of ſtealing in the dwelling-houſe.

The entry on the record was, "Puts himſelf "on his country. Jury ſay, GUILTY of felony "only, in ſtealing goods and chattels to the va-"lue of one hundred and fifty pounds from the "dwelling-houſe. NOT GUILTY of the bur-"glary."

A queſtion aroſe, Whether the priſoner, by virtue of this finding, was not intitled to the benefit of clergy? and the caſe was reſerved by Mr. Juſtice *Burnet* and Mr. Baron *Clarke* for the conſideration of the Judges.

On the 30th November 1744, nine of the Judges (*a*) met at Lord Chief Juſtice *Lee*'s chambers; and they unanimouſly agreed, that as the felony itſelf was made to conſtitute the burglary, and not the intention to commit a felony, the acquittal

(*a*) L. C. J. Lee, L. C. B. Parker, B. Reynolds, B. Clarke, and Willes, Wright, Abney, Burnet, and Denniſon, *Juſtices.*

COMER'S CASE.

quittal of the burglary did, by neceſſary conſequence, include in it an acquittal of the felony alſo; and that the priſoner, by this miſtake in the mode of entering the verdict, was intitled to the benefit of the ſtatute. But they ſaid, that if the entry had been, "Jury ſay, NOT GUILTY "of breaking and entering the houſe in the "night-time, but GUILTY of the reſt of the in-"dictment," he would then have been convicted of ſtealing goods to the value of forty ſhillings in the dwelling-houſe, and would conſequently have been deprived of his clergy by 12 Anne, c. 7. (*b*) *Vide* 1 *Hale*, 559, 560. *Sumner's Caſe*, *Trin.* 1706, *by all the Judges*. *Comyns Rep.* 478. *and the King v. Francis*, *Eaſter Term*, 8 *Geo.* 2. *in* B. R.

(*b*) See Overand's Caſe, poſt. and 2 Hawk. P. C. 625.

CASE 12.

Elizabeth Robinſon's Caſe.

To marry in a falſe name, for the purpoſe of raiſing a ſpecious title to the eſtate of the perſon whoſe name is aſſumed, is a conſpiracy.

AT the Old Bailey, October Seſſion 1746, *George Taylor*, and *Mary Robinſon*, Widow, otherwiſe the Wife of the ſaid *George Taylor*, were indicted, before Lord Chief Juſtice *Willes*, Mr. Juſtice *Foſter*, and Mr. Baron *Reynolds*, for conſpiring together, that the ſaid *George Taylor* ſhould perſonate Mr. *Richard Holland*, in that the ſaid *Mary Robinſon* ſhould be married to the ſaid *Richard Holland*, that ſhe might intitle herſelf to his eſtate, &c. and in purſuance of which conſpiracy they were married accordingly at the pariſh-church of Saint Andrew, Holborn.

The

ROBINSON'S CASE.

The evidence was, that on the 17th July the priſoner, *Mary Robinſon*, who lived as a kind of ſervant with Mr. *Holland*, of Hornſey, ordered a man to take a box from her maſter's houſe to town, and leave it at the ſtable where her maſter put up his horſes. Early on the morning of the next day, ſhe called at the ſtables, and left word that a man would come for the box. Accordingly the priſoner *George Taylor* called for it, and in the afternoon brought it again; after which Mrs. *Robinſon* called to know if the box was brought, and deſired that it might be ſent to Mr. *Holland*'s, in Newgate-ſtreet. On the morning of the 18th, the priſoner *Taylor* went to the office of Mr. *Ruſhworth*, a Proctor in Doctors Commons, and aſked if he could have a marriage licence there. On anſwering in the negative to the queſtion, whether it was for himſelf, and being told that one of the parties muſt come, he went away, and returned ſoon after to the office with Mrs. *Robinſon*, whom he left there. On the ſame day Mrs. *Robinſon*, being at the Sun Tavern, in St. Paul's Church-Yard, ſent a porter to the Eaſt India Warehouſe in Fenchurch-ſtreet, for the priſoner *Taylor;* and in about a quarter of an hour after the porter had returned, he came, dreſſed in a *dark-coloured coat*, and aſked where the woman was. After ſtaying a ſhort time he went out, and returned again, in a *light-coloured coat*, and a light wig, which he deſired the waiter to comb, telling him he need not carry it to the barber's. Mrs. *Robinſon* was dreſſed in white ſattin, with a large black bonnet over her face. This was about the hour of ten o'clock. Between ten and eleven, immediately after morning prayers, they were married at Saint Andrew, Holborn, by virtue of a licence,

by

ROBINSON'S CASE.

by the names of *Mary Robinſon*, of the pariſh of Hornſey, Widow, and *Richard Holland*, Batchelor, of the ſame place. During the ceremony *Taylor* was in ſuch agony and confuſion, that the ſweat ran down his face. The lady was given away by the deputy-clerk; and the coat, ſhirt, neckcloth, and wig which *Taylor* had on, were proved to be *the real Mr. Holland*'s own cloaths, which Mrs. *Robinſon* had the day before ſent in the box to the Livery-Stables. Being thus married, they went to the King's Head Tavern, in Holborn, where they dined; after which *Taylor* went to Mr. *Strangate*'s, in Holborn, where he had dreſſed, and replacing Mr. *Holland*'s cloaths in the box, and putting on his own, he carried it to the Livery-Stables; from whence it was ſent, by the deſire of Mrs. *Robinſon*, as before mentioned, to Mr. *Holland*'s houſe in Newgate-ſtreet. The wig, however, by ſome accident, was miſſing from the box, which, with ſomething Mr. *Holland* had heard, gave riſe to a ſuſpicion of what had been going on; and he accordingly cauſed the priſoners to be apprehended, when they both of them made a full confeſſion of the facts above related.

Upon this evidence it was contended by the Counſel, on the part of the priſoner, that by the Common Law people may marry by whatever name they pleaſe; and although the indictment charges, that in the preſent caſe it was a conſpiracy, yet they have not proved that any one has in fact been injured, or that it was done with any view or intent that a third perſon ſhould ſuffer any injury from it. Many reaſons may exiſt which may make it expedient for people to marry

marry in fictitious names, which may by accident be the names of other perſons; but it is not the imagination of ſuch third perſon that they are thereby injured, which will make the parties guilty of an offence. It muſt be made out that there has been a combination to affect the intereſt, or injure the eſtate of a third perſon, before any ſuch act can be conſtrued a conſpiracy; for a conſpiracy muſt be to do an injury to the perſon or eſtate of another. ROBINSON'S CASE.

The Court, however, over-ruled the objection; and obſerved, that it was the province of the Jury to collect from all the circumſtances of the caſe, whether there was *not* an intention or deſign in theſe parties to do a future injury to Mr. *Holland*; and that it was not neceſſary to prove any direct or immediate injury, or even to ſhew any ſpecific overt act of conſpiracy. 8 Mod. 11. 320. 1 Bla. Rep. 392. Stra. 144. 1 Hawk. 318.

The Jury found the priſoners guilty of conſpiracy: *Mary Robinſon* was impriſoned two years in Newgate, and *George Taylor* ſix months in the Poultry Compter.

The King *againſt* Haines. CASE 13.

AT the Summer Aſſizes 1747 for the County of *Worceſter*, *Richard Haines* was convicted upon an information of *Maihem*. An Act of Grace, including this offence, had paſſed between the time of pleading *Not Guilty* and the trial; but the defendant, on being arraigned, had neglected to take advantage of it. A convict allowed the benefit of a general pardon, tho' he had neglected to pray it in proper time.

HAINES's CASE.

In the Michaelmas Term ſubſequent to the conviction, the defendant moved the Court of King's Bench that he might have the benefit of the Act, and a rule was granted to ſhew cauſe.

Mr. *Bathurſt*, for the Crown, contended, that as the defendant had neglected to pray the benefit of the Act at the time of his trial, he now came too late; and 2 *Hawk. c.* 37. *ſ.* 59. *Kely*, 24. *Jenk. Cent.* 129. *Hale*, 252. and *Ratcliffe's Caſe (a)*, were cited.

(*a*) Foſter 43. 3 Wilſ. 150.

Mr. *Evans*, for the defendant, ſaid, that the practice of the Old Bailey was to plead *Guilty*, and then to claim the benefit of the Act; but as the defendant had pleaded *Not Guilty*, before the Act paſſed, he could not take advantage of it until the Jury had found him guilty; for no man can have occaſion to require a pardon until he has either confeſſed himſelf guilty, or a Jury has found him ſo.

S. P. C. 169, 173. Bro. Cor. 200.

The Court took time to conſider of the caſe till Eaſter Term 1748; and they then delivered their unanimous opinion, That the defendant was intitled to the benefit of the Act of Grace; but they ordered, that he ſhould pay to the proſecutor his full coſts out of pocket, and gave particular directions to the Maſter accordingly.

Gahagan's

Gahagan's Caſe.

CASE 14.

AT the Old Bailey, January Seſſion 1748, *Uſher Gahagan*, *Terence Connor*, and *Joſeph Maphan*, were indicted before Lord Chief Baron *Parker*, preſent Mr. Juſtice *Burnet*, for High Treaſon, in filing and diminiſhing the current coin.

A conviction of high treaſon may be upon the evidence of one witneſs, in all caſes where there is no corruption of blood.

One witneſs only was produced to prove the fact; and it was ſubmitted to the Court, whether, upon the conſtruction of the ſtatutes 1 Edw. 6. c. 12. 5 and 6 Edw. 6. c. 11. 1 and 2 Ph. and Mary, c. 10. and 7 Will. 3. c. 3. ſ. 2. any perſon can be convicted of High Treaſon, upon the teſtimony of a ſingle witneſs.

The Court, upon the authority of *Anſtruther*'s *Caſe*, *(a)* and upon the opinion of Lord Chief Juſtice *Raymond*, delivered in this Court in October Seſſion 1727, in the caſe of *Anne Johnſton*, were decidedly of opinion, That one witneſs is ſufficient to prove any treaſon, where there is no corruption of blood.

(*a*) He was convicted on the evidence of one witneſs, on the 5 Eliz. c. 11. ſ. 2. for impairing the coin; and at a meeting of all the Judges, at Serjeants Inn Hall, 6 May, 1725, they were unanimous that the conviction was legal—Vide T. Jones, 233.

Case 15. Macdaniel, Berry, and Jones's Caſe.

A perſon cannot be indicted for murder in procuring another to be *executed* by falſely charging him with a crime of which he was innocent.

AT the Old Bailey, January Seſſion 1754, one *Joſhua Kidden* was tried before Mr. Juſtice *Foſter*, for robbing *Mary Jones*, Widow, on the highway, of one guinea, a half crown, and two ſhillings and ſixpence. The proſecutrix ſwore very poſitively to the perſon of the priſoner, and to the circumſtances of the robbery, in which ſhe was confirmed by one *Berry*. The priſoner, on the evidence of theſe witneſſes, was convicted and EXECUTED, and on the 1ſt of March following, the reward of forty pounds, given by 4 and 5 Will. and Mary, c. 8. to thoſe who ſhall convict a Highway Robber, was divided between the proſecutrix *Mary Jones*, *John Berry*, *Stephen Macdaniel*, and *Thomas Cooper*. The hiſtory of this proſecution lay concealed in the wicked boſoms of its fabricators until the 9th of Auguſt, 1754, when the High-Conſtable of the Hundred of Blackheath having fortunately taken up one *Blee* on ſuſpicion of being a thief, it was diſcovered to have been a conſpiracy and contrivance to obtain the reward.

Diligent ſearch was accordingly made to apprehend the miſcreants concerned in this extraordinary tranſaction; and at the Old Bailey, in June Seſſion 1756, *Stephen Macdaniel*, *John Berry*, and *Mary Jones*, were indicted before Mr. Juſtice *Foſter*, preſent Mr. Baron *Smythe*, for the wilful MURDER of *Joſhua Kidden*, in maliciouſly cauſing him to be unjuſtly apprehended, falſely accuſed, tried, convicted, and executed, well knowing him to be innocent of the fact laid to

to his charge, with an intent to ſhare to themſelves the reward, &c. The priſoners were convicted, upon the cleareſt and moſt ſatisfactory evidence, of the fact; and a ſcene of depravity diſcloſed, horrid as it was unexampled. The judgment, however, was reſpited, upon a doubt whether an indictment for murder would lie in this caſe. The ſpecial circumſtances were accordingly entered upon the record, together with an additional finding of the Jury, "That Juſtice-Hall, in the Old Bailey, is ſituated within "the County of the City of London; and that "felonies committed in the County of Middleſex have from time immemorial been accuſtomed to be tried there;" in order that the point of law might be more fully conſidered, upon motion in arreſt of judgment. But Sir ROBERT HENLEY, *the Attorney-General*, declined to argue it; and the priſoners were, at a ſubſequent ſeſſion, diſcharged from that indictment. MACDANIEL, BERRY, & JONES'S CASE.

Sir *William Blackſtone* however ſays, that there were grounds to believe, it was not from any apprehenſion that the point was not maintainable, but from other prudential reaſons.

In May Seſſion 1759, they were again put to the bar, upon an indictment for conſpiring to defeat the public juſtice of the kingdom, in cauſing *Joſhua Kidden* to be executed for a robbery, which they knew he was innocent of, with intent to get into their poſſeſſion the reward offered by Act of Parliament; but no evidence appearing, they were all three acquitted.

Pow's

CASE 16.

Pow's Caſe.

A perſon who is acceſſary to a felonious ſhip-wreck is not within 4 Geo. 1. c. 12. unleſs he *belongs* to the ſhip.

AT the Admiralty Seſſion, at the Old Bailey, held the 25th February, 1754, before Mr. Baron *Adams*, Sir *Thomas Saluſbury*, Knt. Judge of the High Court of Admiralty, Sir *Thomas Birch*, Knt. &c. &c. *John Lancey* and *John Lloyd* were indicted on 11 Geo. 1. c. 21. for unlawfully burning and deſtroying the ſhip *Nightingale*, whereof *Thomas Benſon*, Eſq; was owner, with intention to defraud the Underwriters therein named; and *Thomas Pow* was charged in the ſame indictment as an acceſſary before the fact, for counſelling, adviſing, &c. the ſaid *Lancey* and *Lloyd* to commit the felony aforeſaid.

The Evidence.—*Benſon*, the owner of the ſhip, rented the Iſland of *Lundy*, ſituated in the mouth of the Briſtol Channel, near the middle, between Devonſhire and Pembrokeſhire, *Long.* 4. 40. *W. Lat.* 60. 25. *N.* but within the County of Devon. *Pow* was a Taylor and Saleſman, living near the Point of *Appledore*, a town in Kent, ſeated on the river *Rother*, not far from its influx into the ſea, *Long.* 0. 50. *E. Lat.* 50. 45. *N.* The ſhip was freighted with ſalt, dry goods, maunds of pewter, and a caſk of combuſtibles, and inſured by *Benſon* for 400l. from *Appledore* to *Maryland*. *Pow* ſhipped the ſeamen on board at *Appledore*; and ſhe ſailed from thence to *Lundy Iſland*, where the dry goods and pewter were unloaded, and buried under ground, among the rocks. While the veſſel lay in *Lundy Road*, in fourteen fathom water,

Pow

Pow went on board her, and gave ſeveral of the crew notes of hand, promiſing to pay them a certain ſum of money, as a compenſation for their cloaths, &c. *in caſe the ſhip was loſt, by any misfortune, between that place and the Cape of Virginia on her outward bound paſſage.* *Pow* returned on ſhore; the ſhip ſet ſail; and the morning after, *Lancey*, the Captain, gave orders to ſet the ſhip on fire, which was accordingly done. Pow's Case.

The Jury acquitted *Lloyd*, and found *Lancey* Guilty *(a)*. They alſo found ſpecially, "That "*Thomas Pow*, before the ſaid felony was com- "mitted by *Lancey*, did, near the Iſland of "*Lundy*, within the County of *Devon*, incite, "move, inſtigate, ſtir up, and counſel the ſaid "*John Lancey* to commit the ſame; but that the "ſaid *Thomas Pow* was neither *Owner*, *Maſter*, "*Captain*, or *Mariner* of the ſaid ſhip." (a) He was executed at Execution Dock on Friday June 7, 1754.

Upon this verdict two queſtions were ſubmitted to the opinion of the Judges.

Firſt, Whether an acceſſary *upon the land* to the offence of burning a ſhip, which offence is afterwards committed *upon the high ſeas*, is within the juriſdiction of the Court of Admiralty? or, Whether he ought not to be indicted and tried at the Aſſizes for the County within which *his* offence was committed?

Secondly, Whether *Thomas Pow*, being a Taylor by trade, living at *Appledore Point*, and found by the verdict not to be either *Owner*, *Maſter*, *Captain*, or *Mariner* of the veſſel burnt, is within the conſtruction of the 4 Geo. 1. c. 12. explained by 11 Geo. 1. c. 29. ſ. 6. upon which the indictment

POW'S CASE.

indictment is founded; that ſtatute only ſaying, "That if any *Owner*, *Captain*, *Maſter*, *Mariner*, or other *Officer* belonging to any ſhip ſhall "wilfully caſt away, burn, or otherwiſe deſtroy "the ſhip of which he is owner, or unto which "he belongeth, or in any manner of wiſe procure the ſame to be done, to the prejudice of "the underwriter, &c. he ſhall ſuffer death without clergy."

The Judges were of opinion, That *Thomas Pow*, upon the finding of the Jury, was not an offender within the meaning of the 4 Geo. 1. c. 12. but they gave no opinion upon the firſt point.

CASE 17.

Thomas Mills's Caſe.

Money is not goods, and chattels, within the meaning of the Shop-lifting Act.

AT the Old Bailey, January Seſſion 1755, *Thomas Mills* was tried before Mr. Juſtice *Birch*, preſent Lord Chief Baron *Parker*, and Mr. Juſtice *Foſter*, on the ſtatute of 10 and 11 Will. 3. c. 23. for ſtealing *fifteen ſhillings*, the property of *John Clark*, privily in his ſhop.

It appeared that the priſoner had by ſome means concealed himſelf behind the counter, and taken an opportunity of robbing the till of the *money* charged in the indictment.

1 P. Williams, 267. 3 P. Williams, 112. Foſter, 78. 2 Hawk. 491.

The Court held, That *money* is not included in the words "*goods*, *wares*, *or merchandiſe*," within the

the meaning of this Act of Parliament; and the priſoner was accordingly acquitted of the capital part of the offence. HARRISON'S CASE.

Harriſon's Caſe. CASE 18.

AT the Old Bailey, in February Seſſion 1756, *Nathaniel Harriſon* was tried before Mr. Baron *Adams*, preſent Mr. Juſtice *Denniſon*, and Mr. Juſtice *Bathurſt*, for ſtealing a ſilver tankard, and three ſilver caſtors, the property of *James Cobb*.

A priſoner cannot be found guilty of ſtealing goods, if it appears that he could not otherwiſe get them than by the delivery of the proſecutor's wife.

The priſoner was an apprentice to the proſecutor. The proſecutor's wife had continual cuſtody of the key of the cloſet where her huſband's plate was uſually locked up. It appeared that ſhe had pawned ſome articles of it, in order to ſupply the priſoner with pocket-money, but the articles ſhe pawned were not thoſe mentioned in the indictment. The priſoner indeed had confeſſed, that he had taken the articles in the indictment from the cloſet; and a pawn-broker proved that he had received them in pledge from the priſoner; but it did not appear by what means he had gained acceſs to the cloſet in which they were depoſited.

The Court held, that as the proſecutor's wife had the keeping of the key of the cloſet where the plate was uſually locked up; and it did not appear that the priſoner had taken it without *her privity or conſent*; it was to be conſidered in the ſame

21 Hen. 6. 455. 3 Inſt. 110. Dalt. c. 157. p. 504. 1 Hale, 514.

USHER'S CASE.

ſame light as if he had *received it from her;* and he was accordingly acquitted.

CASE 19.

Thomas Uſher's Caſe.

If a Banker pay a forged draft, and do not debit the account of the perſon whoſe name is forged with the payment, ſuch perſon is a good witneſs to prove the forgery.

AT the Old Bailey, October Seſſion 1759, *Thomas Uſher* was tried before Mr. Baron *Smythe*, preſent Lord *Mansfield*, and Mr. Juſtice *Wilmot*, for forging an acceptance to a bill of exchange, in the name of *Anthony Merry*, for the payment of 250l. and for publiſhing the ſame, knowing it to be forged, with intent to defraud Sir *Charles Aſgill and Co.*

The Bill was as follows:

"*Ex*ª. *pa*ᵗ. 250l. *ſterling.* LAOS DEO, *Malaga*, 5 *Feb.* 1758.

"At uſance and half, pay this our firſt *per* exchange "to Mr. *Domingo Gueico*, or order, 250l. ſterling, value "received of the ſame; which place to account, as per "advice from

"THOMAS QUILTY and Co.

"To Mr. *Anthony Merry*,
"Merchant in London."

The bill was accepted by Mr. *Merry*, and made payable at *Sir Charles Aſgill's and Co.*

The priſoner had lived in the capacity of Caſhkeeper to Mr. *Merry*, a Spaniſh Merchant; and the fact of his having uttered this bill, and received the money for it of *Sir Charles Aſgill and Co.* was proved beyond the poſſibility of contradiction.

diction. It alſo appeared that *Aſgill and Co.* had charged Mr. *Merry*'s account with this payment; but afterwards, being fully perſuaded, from what Mr. *Merry* told them, that it was a forgery, they gave Mr. *Merry*'s account a credit for the ſame ſum. USHER'S CASE.

To prove that the acceptance was forged, the Counſel for the proſecution called Mr. *Merry* himſelf. The priſoner's Counſel objected to the competency of his evidence, unleſs he produced a releaſe from *Sir Charles Aſgill and Co.*

The Court ſaid, That as *Sir Charles Aſgill*'s BANKING-HOUSE was thoroughly ſatisfied of its being a forgery, and had ſettled their accounts, not charging Mr. *Merry* with the payment, or making him any way debtor for the Bill, it was perfectly immaterial to Mr. *Merry*, whether the priſoner was convicted or acquitted, for there could be no demand upon him for the 250l; and upon this ground the objection was over-ruled.

Sarah Taylor's Caſe.

CASE 20.

AT the Lent Aſſizes at Maidſtone, 33 Geo. 2. *Sarah Taylor* was indicted, for that ſhe, about the hour of ten in the night, a certain *outhouſe* of one *W. Q.* commonly called *a Paper-mill*, feloniouſly, voluntarily, and maliciouſly did ſet fire to, againſt the ſtatute, *&c.*

Setting fire to paper in a *drying loft* belonging to a *paper-mill* is not ſetting fire to *an outhouſe*, within the meaning of 9 Geo. 1. c. 22.

It

TAYLOR'S CASE.

It appeared in evidence, that the priſoner had ſet fire to a large quantity of paper, which was drying in a loft annexed and belonging to the mill, but not to any part of the mill itſelf, nor was any part of the mill conſumed.

The Jury found the priſoner guilty; but Mr. Baron *Legge* having expreſſed a doubt, whether *a Paper-mill* could be conſidered as an *Outhouſe*, within the meaning of that branch of the BLACK ACT upon which the indictment was founded; the judgment was reſpited, and the following queſtions ſubmitted to the conſideration of the Judges.

Firſt, Whether *a mill* can be conſidered as *an outhouſe*, within the meaning of the 9 Geo. 1. c. 22. which enacts, "That if any perſon ſhall ſet "fire to any houſe, barn, or *outhouſe*; or to any "hovel, cock, mow, or ſtack of corn, ſtraw, "hay, or wood, *&c.* they ſhall be guilty of felo-"ny, without the benefit of clergy."

Secondly, Whether ſetting fire to paper in a drying-loft belonging to a mill can be conſidered as ſetting fire to the mill?

The next aſſizes Mr. Juſtice *Foſter* ſaid, that he had laid the caſe before the Judges; and they were unanimouſly of opinion, that as the priſoner had not ſet fire to any part of the mill, and as no part of the mill was conſumed, *this caſe* was not within the ſtatute.

She was accordingly admitted to bail, and afterwards received the King's pardon.

Oatley's

Oatley's Caſe.

CASE 21.

AT the Old Bailey, October Seſſion, 1760, *Margaret Oatley* and *Mary Burn* were indicted before Sir *William Moreton*, Recorder, preſent Mr. Juſtice *Clive*, for robbing *William Baldwyn* on the King's highway.

An indictment for a robbery *on the highway* is not ſupported by evidence of robbery in a *dwelling houſe*.

It appeared that the priſoners met the proſecutor in Drury-lane; dragged him through a court into a houſe; and there robbed him.

Per Curiam. This evidence will not ſupport the capital part of the charge. The indictment lays the robbery to have been committed *on the King's highway;* but the proof is, that it was committed in a *dwelling houſe* (*a*).

(*a*) See 2 Hawk. c. 33. ſ. 79 *ſed quære*, for by 3 and 4 Will. and Mary, c. 9. the benefit of clergy is taken away from robbery *generally*.

Morris's Caſe.

CASE 22.

AT the Sittings after Eaſter Term, 1761, in the King's Bench, *John Morris* was tried before Lord *Mansfield* of wilful and corrupt perjury, in an anſwer in Chancery. No evidence was given of the identity of the perſon who ſwore the anſwer, nor was it proved that any perſon at all had ſworn it; but the name ſubſcribed to the anſwer was proved to be the hand-writing of the defendant; and Maſter *Bennett* proved that the *jurat* was ſubſcribed by him; but he had no recollection of the perſon of the defendant.

What evidence is neceſſary in perjury.

The

MORRIS's CASE.

The defendant's Counſel contended, that this evidence was not ſufficient, but that it was neceſſary to prove that the defendant was the very ſame perſon who had ſigned the anſwer, and that he had actually ſworn the anſwer to be true; but his Lordſhip over-ruled the objection, and the defendant was convicted.

In the Trinity Term following he was brought up for judgment; and *Lord Mansfield*, in making his report of the evidence, ſtated the objection which had been made at the trial to Mr. Juſtice *Denniſon*, and Mr. Juſtice *Wilmot* (*Foſter* abſent), and deſired to have the opinion of the Court upon the point.

2 Burr. 1189. Sed vide the caſe of Thomas Brady, Old Bailey July Seſſion, 1784.

The Court. The name ſubſcribed to the anſwer was proved to be the hand-writing of the defendant, and it was proved that the *jurat* was ſubſcribed by the Maſter, as being ſworn before him: this is ſufficient proof that the defendant is the ſame perſon, and that he actually ſwore the anſwer he ſubſcribed. The order of the Court of Chancery, "that all defendants ſhould *ſign* their "anſwers," was intended to facilitate the proof of perjury; and a *jurat* atteſted by the proper perſon before whom the oath ought to be taken, is ſufficient proof of its being actually ſworn by the perſon whoſe name is ſigned; at leaſt ſo far as to put it upon him to give ſome probable evidence that he was perſonated; as it would otherwiſe be difficult, and perhaps impoſſible to convict any one of perjury committed in an anſwer to a bill in Chancery.

William

William Lee's Caſe.

CASE 23.

A huſband cutting his wife's throat quite acroſs, while they were in bed, is not a maiming, or lying in wait, within the 22 and 23 Car. 2. c. 1.

AT the Old Bailey, July Seſſion 1763, *William Lee* was indicted on the COVENTRY ACT, 22 and 23 Car. 2. c. 1. before Lord Chief Baron *Parker*, preſent Mr. Juſtice *Bathurſt*, and Mr. Juſtice *Wilmot*, for that he, contriving and intending *Agnes* his wife to maim and diſfigure, on purpoſe and of malice aforethought, by lying in wait, did make an aſſault with a certain razor, and the neck of the ſaid *Agnes* did cut, *&c.* with intent to maim and diſfigure.

The facts were, that the priſoner returned home one night, after his wife and two children were abed and aſleep, and cut his wife's throat with an old razor which he had concealed in his ſtocking, making a wound about three inches in length, and quite acroſs; but providentially it was not mortal.

The words of the Act of Parliament are, "That whoever ſhall on purpoſe, and of malice "aforethought, and by lying in wait, unlawfully "cut out, or diſable the tongue, put out an eye, "ſlit the noſe, cut off a noſe or lip, or cut off "or diſable any limb or member, *&c.* ſhall ſuf-"fer death without clergy:" and it was ſubmitted to the Court, that the evidence did not prove any offence within the ſtatute.

The Court were of the ſame opinion; and the priſoner was accordingly acquitted.

Leigh's

CASE 24.

Leigh's Caſe.

Dollars, or Portugal money, not current by proclamation, are not goods within the meaning of the 24 Geo. 2. c. 45.

AT the Old Bailey, February Seſſion 1764, *John Leigh* was indicted on 24 Geo. 2. c. 45. before Mr. Juſtice *Gould*, preſent Mr. Baron *Perrott*, for ſtealing ſundry articles of wearing apparel, value twenty-one ſhillings, two dollars value nine ſhillings, and two guineas, the property of *John Lockhart*, being in a certain ſhip called the *Devonſhire*, lying on the river *Thames*.

Ante, 49, 50.

The larceny of all the property laid in the indictment was very clearly proved; but the Act of Parliament takes away the benefit of clergy from thoſe only who ſhall "ſteal any *goods*, "*wares*, *or merchandize*, of the value of forty "ſhillings in any veſſel upon any navigable ri-"ver." It was ſubmitted to the Court, that the *dollars and the two guineas*, being *money*, were not within the deſcription of either *goods*, *wares*, *or merchandize*; and as the value of the other articles did not amount to forty ſhillings, the priſoner muſt be acquitted of the capital part of the charge.

The Court were of this opinion; and the priſoner was found guilty of the ſingle felony only (*a*).

(*a*) At Maidſtone Lent Aſſizes 1752, George Grimes was indicted on this ſtatute, for ſtealing a conſiderable ſum of money out of a ſhip in port; and it was ruled, that money was not within the meaning of the Act, though great part of it conſiſted of Portugal money, not made current by proclamation, but commonly current. Foſter, 79.

John

John Jones's Caſe.

CASE 25.

AT the Old Bailey, October Seſſion 1764, *John Jones* was indicted before Mr. Baron *Smythe*, preſent Lord *Mansfield*, and Mr. Juſtice *Bathurſt*, for forging an order for the delivery of goods, to this purport:

Forging an order in the name of a ſilverſmith for the redelivery of plate from Goldſmiths-Hall, is within the 12 Geo. 2. c. 26. and 13 Geo. 3. c. 26.

" SIR, *September* 23, 1764.

" Pleaſe to deliver my work to the Bearer

" LYDIA BELL,

" *Fleet-ſtreet, London,*"

with intent to defraud the Wardens and Company of Goldſmiths.

It appeared in evidence, that Mrs. *Bell* was a ſilverſmith, and had ſent two ſilver tankards, and two ſilver cups with covers, by *John Harper*, her apprentice, to Goldſmiths Hall to be marked: That the form of the order was the ſame as is uſually ſent upon ſuch occaſions; but that in ſtrictneſs, and by the rule of the Plate-Office, the ſeveral ſpecies of work, with the weight of the ſilver, ought to be mentioned. It was proved by an accomplice, that the priſoner had written the note, and ſigned the name of LYDIA BELL, *Fleet-ſtreet*, to it.

The Jury found the priſoner *Guilty*. He moved however in arreſt of judgment; and his caſe was reſerved for the opinion of the Judges.

In September Seſſion 1766, he received pardon on condition of tranſportation.

CASE 26.

John Morgan's Caſe.

A *Mahometan* may be ſworn on the *Alcoran* in a proſecution for a capital offence.

AT the Old Bailey, December Seſſion 1764, *John Ryan*, *Mary* his wife, and *Jeremiah* his ſon, were indicted before Mr. Baron *Adams*, preſent Mr. Juſtice *Wilmot*, for ſtealing ſeveral articles of wearing apparel, a quantity of Bengal coins, and five guineas, the property of *John Morgan*, in the dwelling-houſe of the ſaid *John Ryan*.

2 Keb. 314.
1 Wils. 84.
2 Atk. 21.
1 Sid. 6.
1 Vere, 265
1 Hale, 634
2 Hale, 279, 283.
2 Hawk.
Stra. 821, 1104.
Cowp. 390.
2 Eq. Ca. Ab. 397.
Burr. 1117.

It appeared that the proſecutor *John Morgan* was a *Mahometan*. The priſoners were therefore remanded, in order to take the opinion of the twelve Judges, whether a *Mahometan* could be permitted to ſwear on the *Alcoran*, in a proſecution for a capital offence.

In February Seſſion 1765, Mr. Juſtice *Gould* delivered it as the unanimous opinion of the Judges, that he might be ſo ſworn.

An *Alcoran* was accordingly produced. The witneſs firſt placed his right hand flat upon it, and put the other hand to his forehead. He then looked for ſome time upon it; and on being aſked what effect that ceremony was to produce, he anſwered, that he was bound by it to ſpeak the truth.

The priſoners were found guilty of ſtealing, but not in the dwelling-houſe.

Barney

Barney Carroll's Caſe.

CASE 27.

AT the Old Bailey, in July Seſſion 1765, *Barney Carroll* was indicted before Lord Chief Baron *Parker*, on the 22 and 23 Car. 2. c. 1. ſ. 7. for that "he did on purpoſe, and of malice "forethought, and by lying in wait, feloniouſly "and unlawfully make an aſſault upon *Cranley* "*Thomas Kirby*, Eſq. with intention to maim "and disfigure him; and with a certain knife "did on purpoſe, and of his malice forethought, "and by lying in wait, unlawfully and feloni-"ouſly *ſlit the noſe* of the ſaid *Cranley Thomas* "*Kirby*, with intention, in ſo doing to maim and "disfigure him. AND THAT *William King*, at "the time of the committing of the ſaid felony, "was preſent, counſelling, aiding, and abetting "the ſaid *Barney Carroll* to commit the felony "aforeſaid."

What kind of *cut* ſhall be conſidered *a maim* within the Coventry Act.

See the Indictment at large Crown Cir. Aſſiſtant, 219.

The proſecutor had apprehended a young pickpocket, near Somerſet-houſe in the Strand; and upon threatening to take him before a Magiſtrate, the priſoner Carroll, who appeared to have been lurking under the ſide of the New Church, immediately came up, and followed the proſecutor while he was conducting the boy towards Temple-bar, walking ſometimes before, and ſometimes behind them, until they came to the top of Arundel-ſtreet, when he ſtruck the proſecutor a violent blow acroſs the noſe and eyes with a razor-bladed knife, ſaying, "Damn you, ſir, let "the boy go;" and it was proved by an accomplice that four of them had that evening gone out to pickpockets, under an agreement to ſtrike or

CARROLL'S CASE.

ſtab, or cut the noſe and eyes of any perſon who moleſted them. The wound bled profuſely; and upon examination it appeared that the two great blood-veſſels on Mr. *Kirby*'s forehead were divided; that there was a large tranſverſe wound acroſs the noſe, ſo wide open that the bone was viſible. It began from the right, and went acroſs the eye-lid, and acroſs the noſe. The two muſcles of the noſe were cut through. It proceeded to the left eye-lid, and terminated at the temple. A nerve was cut.

It alſo appeared in evidence, that in many old authors who have written on Surgery, ſuch wounds are called *ſlits*, but that *ſlit* is a word not made uſe of now. The word *ſlit* is underſtood as ſynonimous to the word *cut;* but the idea which was formerly conveyed by the word *ſlit*, is now expreſſed in ſpeaking technically by the word *divided*.

Vide Lee's Caſe, ante, p. 55.

The Jury found the priſoners guilty; but it was queſtioned, Whether ſuch *a cut* was a *ſlitting* within the letter of the Act, the wound not having perforated to the noſtril. It was accordingly referred to the conſideration of the Judges; and they were of opinion, That the offence deſcribed in the indictment was properly proved, and the conviction legal.

Both the priſoners were executed.

Elizabeth

Elizabeth Dunn's Caſe.

CASE 28.

AT the Old Bailey, September Seſſion 1765, *Elizabeth Dunn* was indicted before *James Eyre*, Eſq. Recorder, for forging a promiſſory note for the payment of money, in the words and figures following :

Forgery may be committed by making *a mark*, in the name of another perſon.

" July 27, 1765.

" I promiſe to pay to Mr. *Edward Hooper*, or " order, the ſum of three (*omitting the word* " *pounds*) thirteen ſhillings and ſixpence, ſeven " days after date, value received.

" *Mary Wallace* ✠ her mark."

" *Witneſs John Whettall.*"

with intention to defraud the ſaid *Edward Hooper*.

N. B. It was alſo laid with intention to defraud the perſon intitled to receive the money due to *John Wallace*, late ſeaman on board his Majeſty's ſhip *L'Eprcuve*.

It appeared upon the evidence, that Mr. *Hooper* was a Prize-Agent, and that the priſoner applied to him with the probate of a will ; in conſequence of which he made ſearch, and found there were wages due to *John Wallace* ; but he refuſed to pay her until ſhe produced a certificate of her identity. She however pleaded poverty, and prevailed on him to lend her five ſhillings. She afterwards produced the certificate ; but as the money could not be immediately got, ſhe begged he would let her have a little more. In conſequence of her importunity, he advanced three guineas and a half. He then wrote the body of the note, and called his lad, who ſaw her

DUNN'S CASE.

her make her mark. She then ſaid her name was *Mary Wallace*, and *Hooper* then wrote *Mary Wallace her mark*, and his lad witneſſed it. It was clearly proved that her name was *Elizabeth Dunn*, and not *Mary Wallace*.

The Jury found her guilty; but her caſe was reſerved for the opinion of the Judges; and ſhe was ordered for execution in the December Seſſion following.

CASE 29.

James Gibſon's Caſe.

Forging *an office copy* of the Accountant-General's certificate, is within the penalty of 12 Geo. 1. c. 32.

AT the Old Bailey, in January Seſſion 1766, *James Gibſon* was indicted on 12 Geo. 1. c. 32. before Lord Chief Baron *Parker*, Mr. Juſtice *Gould*, and Mr. Juſtice *Yates*, for forging a certain inſtrument, in writing, *purporting* to be an office-copy of the Accountant-General's certificate of paying into the Bank the ſum of 437l. 13s. 7d. being the balance of the accounts of Mr. *William Hunt*, the Receiver of an eſtate in queſtion, in a cauſe depending in the Court of Chancery, wherein *Robert Lee* and *Chriſtopher D'Oyley*, Eſq. executors of Sir *George Browne*, Bart. are plaintiffs, and *Robert Pringle* and others defendants: AND for publiſhing ſuch office-copy, knowing the ſame to be forged, with intent to defraud the ſaid *William Hunt* of the ſaid ſum of 437l. 13s. 7d. againſt the ſtatute.

The

The inſtrument in queſtion was in the following form.

" 20th of Feb. 1764.

" Between *Robert Lee*, Eſq; and *Chriſtopher* " *D'Oyley*, Eſq; executors of Sir *George Browne*, " Baronet, plaintiffs, AND *Robert Pringle*, Eſq; " and others, defendants.

" By original and ſupplemental bills, and bills of reviver.

" I do hereby certify, that, purſuant to an or- " der dated the thirteenth of February inſtant, " Mr. *William Hunt* the Receiver hath paid into " the Bank of England, the ſum of four hundred " and thirty-ſeven pounds, thirteen ſhillings and " ſeven pence, which is placed to my account, " as Accountant-General, and to the credit of the " cauſe of *Brown againſt Pringle*, in Maſter *Ben-* " *nett*'s office; as appears by the receipt of Mr. " *B. Sabbarton*, one of the Caſhiers of the Bank, " dated the ſixteenth inſtant, hereto annexed.

" T. ANGUISH,
" *Accountant-General.*"

" LONDON, *the 16th of Feb.* 1764.

" Received of Mr. *William Hunt*, the Receiver, " the ſum of 437l. 13s. 7d. purſuant to an order " dated 13 February inſtant, made in the cauſe " of *Lee againſt Pringle*, which money is placed " to the account of *Thomas Anguiſh*, Eſq; as " Accountant-General of the Court of Chancery, " and to the credit of the cauſe of *Browne againſt* " *Pringle*, in Maſter *Bennett*'s office, in the books " kept at the Bank for the ſuitors of the ſaid " Court of Chancery.

" For the Governor and Co. of the Bank of " England, 437l. 13s. 7d. entered"

" *B. Sabbarton.*"

" *T. Gradwell*, examined."

The

GIBSON'S CASE. The Jury found the priſoner guilty of the facts laid in the indictment; but it was objected by his Counſel, that it was not an offence within the 12 Geo. 1. c. 32. upon which ſtatute the indictment was founded. There was accordingly a ſpecial verdict framed for the opinion of the Judges.

The priſoner was executed on Wedneſday 23d March, 1768.

CASE 30.

The Coal-Heavers Caſe.

Perſons preſent aiding and aſſiſting in *ſhooting at another*, are principals, and within the penalties of the BLACK ACT.

AT the Old Bailey, in July Seſſion 1768, *John Granger* and ſix other Coal-heavers were tried before Mr. Juſtice *Gould*, preſent Lord Chief Baron *Parker*, and Mr. Juſtice *Aſton*, upon the BLACK ACT, 9 Geo. 1. c. 22. for *maliciouſly* ſhooting at one *John Green*.

The evidence diſcloſed a ſcene of warfare quite unexampled but in times of general commotion. An act of Parliament had then lately paſſed for regulating the wages of the Coal-heavers, and Mr. *Green* was appointed deputy-agent for carrying it into execution. By an avaricious oppoſition however, made by a Juſtice of the Peace in the neighbourhood of Shadwell, Mr. *Green* became obnoxious to the Coal-heavers, and they attacked his houſe in Gravel-lane with every ſpecies of offenſive weapons they could collect. Four of the priſoners were proved to have fired at Mr. *Green* through the windows of his houſe; and the marks of

THE COAL-HEAVERS CASE.

of a great number of balls were afterwards found in different parts of the room. The other three priſoners were proved to have been preſent when the others fired, but they were not ſeen to uſe any fire-arms themſelves.

The Jury found all the ſeven priſoners guilty: but a queſtion was reſerved for the opinion of the Judges, Whether thoſe who were only preſent aiding and abetting, were involved in the ſame guilt with thoſe who had actually fired, the ſtatute upon which the indictment was framed being ſilent as to aiders and abettors?

The Judges determined, That this offence was a new-created felony; and therefore, that it muſt neceſſarily poſſeſs all the incidents which appertain to felony, by the rules and principles of the common law. The ſtatute does not merely take away the privilege of clergy from an offence which was before known, but it ordains that thoſe who are guilty of the thing prohibited by it, ſhall be adjudged felons without benefit of clergy; and therefore, by a neceſſary implication, makes all the procurers and abettors of it, principals or acceſſaries, upon the ſame circumſtances which will make them ſuch in a felony by the common law; and it hath been long ſettled, that all thoſe who are preſent aiding and abetting when a felony is committed, are principals in the ſecond degree.

19 Hen. 6. 17. Staun. 44. 3 Inſt. 45. 1 Hale, 613. 2 Hawk. 444. Foſter, 354.

The ſeven priſoners were accordingly executed, on Tueſday 26th July, 1768, near the Sun-Tavern Fields, Shadwell.

The

CASE 31.

The King *againſt* Dick.

Forging a Scotch bank-note is not within the Engliſh ſtatutes againſt forgery.

THE priſoner was convicted at Newcaſtle upon Tyne in the year 1770, of knowingly uttering a forged and counterfeited writing obligatory, commonly called a Scotch bank-note (*a*), with intention to defraud *John Ormſton* and *Joſeph Lamb*. The note was in the following form:

" FIVE POUNDS. BOND ACCORD. STERLING.
No $\frac{15}{28}$

" *Aberdeen*, 1 *May*, 1767.

" The Banking Company in Aberdeen are " hereby obliged to pay to *James Brand*, or " bearer, on demand, at their Office HERE, Five " Pounds Sterling, by order of the Directors.

" R. SUNDERLAND,

" W. Brebner, } *Directors.*" " *Caſhier.*"
" J. Burnett, }

(*a*) Vide 5 Geo. 3. c. 49. for preventing the inconveniencies ariſing from the circulation of Scotch bank-notes.

It appeared in evidence, that the Company was an aſſociation of moſt of the gentlemen of that county; and that they iſſue notes under the ſignature of a Caſhier and two Directors, in the form above-mentioned.

It was ſubmitted to THE TWELVE JUDGES, Whether this note is within the meaning of the ſtatute of 2 Geo. 2. c. 25.? and if ſo, Whether the uttering it in England is felony?

The Judges were divided in their opinions upon both theſe queſtions; the 2 Geo. 2. c. 25. negatively excluding *Scotland*; and the note being

ing payable *locally* where it is drawn. The priſoner laid in gaol for ſome time, and at length received the King's pardon. DICK's CASE.

The King *againſt* Donnavan. CASE 32.

AT Serjeants Inn Hall, on the firſt day of Eaſter Term 1770, Mr. Juſtice *Gould* ſubmitted the following caſe to the conſideration of the Judges (*a*).

A *priſon* is a *houſe* within the meaningof 9 Geo. 2. c. 22.

At the laſt Lent Aſſizes for Lancaſter, *James Donnavan* was tried, and found guilty of the crime of Arſon.—The *firſt* count in the indictment charged him with maliciouſly ſetting on fire, about the hour of eleven at night, "a "houſe of the Mayor, Bailiffs, and Burgeſſes, "of the town of *Liverpool*, called the Common "Gaol."—The *ſecond* count deſcribed it to be "a houſe of the Mayor and Bailiffs, by name "called the Common Goal."—The *third* count deſcribed it to be "the houſe of *Hannah Ker*-"*by*."—A *fourth* count deſcribed it to be "the "houſe of *Richard Rigby*." But it was not added in either of the laſt counts, "called a Com-"mon Gaol."

(*a*) They were all preſent except Mr. Baron *Adams*.

The priſoner was confined for debt, and on the 28th Jan. 1770, he voluntarily ſet fire to his box, which was a little apartment in the priſon; and the whole gaol would unavoidably have been burned down if timely aſſiſtance had not extinguiſhed the flames. The gaol belonged to the Corporation of Liverpool; and was always uſed as

DONNAVAN'S CASE.

as the place of confinement both for their criminals and debtors. *Richard Rigby*, one of the Serjeants of the town, was the keeper of this gaol; and there is a dwelling-houſe adjoining to it for him to live in, and wherein he permitted his mother-in-law, *Hannah Kerby*, to dwell, who kept it as a public-houſe. A wall ſeparates the priſon from his houſe; and the entrance into the priſon is from the dwelling-houſe by a door through the wall, which door is locked every night. Nobody inhabits in the priſon itſelf but the priſoners. If any priſoner is able to pay for a bed, Mrs. *Kerby* ſupplies it, either in the gaol or in the houſe; and the rate of payment is the ſame, whether it is in the one place or the other.

The ſtatute of 9 Geo. 1. c. 22. enacts, "That "if any perſon or perſons ſhall ſet fire to any "houſe, barn, or out-houſe, or to any hovel, "cock, mow, or ſtack of corn, ſtraw, hay, or "wood, &c. they ſhall ſuffer death without be-"nefit of clergy." And the queſtion is, Whether this PRISON is to be conſidered as a HOUSE within the meaning of the legiſlature?

The Judges concurred with Mr. Juſtice *Gould*, that this caſe was fully within the meaning of the Act; the dwelling-houſe being to be conſidered as part of the priſon, and the priſon as the houſe of the Corporation.

Cox's Caſe.

CASE 33.

JOHN COX was tried and convicted, at the Old Bailey, upon an indictment of perjury at common law, for that he, intending to hold one *Jonathan Chubb* to bail, on 23d May, 1770, *falſly*, *maliciouſly*, *wickedly*, and *corruptly*, ſwore that the ſaid *Jonathan Chubb* was juſtly and truly indebted to him in the ſum of 1300l. and upwards, for a moiety or half part of a ſhip called *The Hibernia*, and her tackle, apparel, furniture, *&c.*

The word "wilful" is not neceſſary in an indictment of perjury at common law.

It was objected by the priſoner's Counſel, in arreſt of judgment, that the indictment was bad, in not having ſtated that the offence had been committed *wilfully*; and the caſe was reſerved for the opinion of the Judges.

Ten Judges, Ld. C. J. *De Grey abſent*, were unanimouſly of opinion, That in an indictment for perjury on the 5 Eliz. c. 9. the word *wilfully* is eſſential, and muſt be inſerted; becauſe the term "*wilful*," in the ſtatute, is a material deſcription of the offence; but that it is not neceſſary in the preſent caſe: for the indictment being at common law, and not on the ſtatute, the words *falſly*, *maliciouſly*, *wickedly* and *corruptly*, imply that the offence was committed *wilfully*. And the following authorities were cited. *Hetl.* 12. *Cro. Eliz.* 147, 201. 2 *Hale*, 169, 172, 184, 187. *Shower* 190. 3 *Inſt.* 167. 2 *Hawk. 6th edit.* 258, 326.

Ld. Manſfield, Ld. C. B. Smythe, J. Gould, J. Willes, J. Blackſtone, J. Aſhurſt, J. Nares, B. Eyre, B. Adams, B. Perrot.

John

CASE 34.

John Paty's Caſe.

The 9 Geo. 1. c. 22. was deſigned to extend the offences deſcribed in 22 and 23 Car. 2. c. 7. and therefore *horſes*, *mares*, and *colts*, are included in the word *cattle*.

AT Abingdon, Summer Aſſizes 1770, *John Paty* was tried and convicted on the 9 Geo. 1. c. 22. before Mr. Juſtice *Blackſtone*, for maliciouſly ſhooting at and killing *one mare*, of a mixed red and white colour, and one brown *ſtone colt*, the property of *Matthew Batten*.

The words of the ſtatute are, "That if any perſon ſhall unlawfully and maliciouſly kill, maim, or wound any *cattle*, he ſhall ſuffer death without benefit of clergy."

It was moved in arreſt of judgment, that the indictment ought to have averred, that the *mare* and *colt* were *cattle* within the meaning of the Act, for that the word *cattle* did not neceſſarily include *horſes*, *mares*, and *colts*. To ſupport theſe objections it was argued, That the 3 and 4 Edw. 6. c. 19. 5 and 6 Edw. c. 14. and 31 Geo. 2. c. 40. for regulating the ſale of cattle, have thought it neceſſary to mention by *name* the ſeveral ſpecies of beaſts to which the proviſions of theſe Acts ſhould extend: That the 12 Car. 2. c. 4 diſtinguiſhes between the ſubſidy to be paid on *great cattle* imported, viz. 5os. and that which is paid on *horſes* and *mares*, viz. 10l. That 22 Car. 2. c. 13. diſtinguiſhes between the encouragements given for breeding *cattle of all ſorts*, and for breeding *horſes*:—That when 14 Geo. 2. c. 6. made it felony without clergy to ſteal ſheep or other *cattle*, it was found neceſſary to ſpecify, by 15 Geo. 2. c. 34. what cattle were intended by the Act, among which neither horſes, mares, or colts are included.

On

PATT's CASE.

On the firſt day of Michaelmas Term 1770, this caſe was ſubmitted to the Judges at Serjeants Inn; and they unanimouſly agreed, That as the ſtatute of 22 and 23 Car. 2. c. 7. had made the offence of killing horſes *by night* a ſingle felony, this ſtatute of 9 Geo. 1. c. 22. was to be conſidered as an extenſion of that Act; and ſome precedents of capital convictions were cited upon this branch of the ſtatute, but none of executions.

It was agreed that judgment of death ſhould be given againſt the priſoner at the next aſſizes; but he was then reprieved for tranſportation; and afterwards, upon ſtrong application from the country, received a free pardon (*a*).

(*a*) See the caſe of *Robert Mott*, O. B. Sept. Seſſ. 1703, convicted for wounding a gelding, where an objection in arreſt of judgment was over-ruled by Mr. Baron *Hotham* upon the authority of this caſe.

Richard Mortis's Caſe.

CASE 35.

A BILL of indictment had been found at *Hicks's Hall*, by the Grand Jury for *the County of Middleſex*, againſt *Richard Mortis*, for maliciouſly ſhooting at one *Thomas Parkinſon*, in the *County of Hertford*. The priſoner was arraigned upon this indictment at the *Old Bailey*, January Seſſion 1771; but Lord Chief Baron *Parker*, and Mr. Juſtice *Gould*, who were then in the Commiſſion of General Gaol Delivery of *Newgate*, doubted, whether the words of The BLACK ACT authoriſed a private proſecutor to proſecute for this offence in any county at his option;

A private proſecutor on 9 Geo. 1. c. 22. has an option to prefer his indictment in ſuch county as he think moſt favourable to the ends of juſtice.

MORTIS's CASE.

tion; or whether a ſpecial commiſſion ought not to be granted by the King for this purpoſe. Upon this doubt the priſoner was remanded, and the queſtion ſubmitted to the conſideration of the Judges at Serjeants Inn Hall, on the firſt day of the then next enſuing Hilary Term; and it was generally agreed, that the words of 9 Geo. 1. c. 22. ſ. 14. extend to give a proſecutor the option of preferring his indictment in ſuch county in *England* as may appear to him to be moſt conducive to the ends of juſtice; but that he cannot exerciſe this right for the purpoſes of injuſtice and oppreſſion: for the words are, "And for the *better and more impartial trial* of any indictment "or information which ſhall be found, commenced, or proſecuted for any of the offences "committed againſt this Act; BE IT ENACTED, "That every offence that ſhall be done or committed contrary to this Act, ſhall and may be "enquired of, examined, tried, and determined "in any county within that part of *Great Britain* "called *England*, in ſuch manner and form as if "the fact had been therein committed."

The priſoner was accordingly tried and convicted at the Old Bailey, before Mr. Juſtice *Aſhburſt* in the February Seſſion following, and was afterwards executed purſuant to his ſentence.

Maximilian

Maximilian Miller's Caſe.

CASE 36.

MAXIMILIAN MILLER was convicted of grand larceny in January Seſſion 1771, and received judgment of tranſportation to America for the term of ſeven years. On the 22d April following he obtained the SIGN MANUAL, ſignifying to the Recorder and Sheriffs of London his Majeſty's intention to pardon the ſaid crime; "upon condition of giving ſecurity, to the ſatiſ- "faction of the Recorder, to leave the kingdom "within the ſpace of fourteen days from the "date thereof, and not to return again for the "ſpace of ſeven years:" AND ORDERING, "That the ſaid *Maximilian Miller* be, upon his "giving ſuch ſecurity as aforeſaid, immediately "diſcharged out of cuſtody; and that he be in- "ſerted for his crime above-mentioned in the "firſt and next general pardon that ſhall come "out for the poor convicts in Newgate." On the 23d April this SIGN MANUAL was delivered to the Recorder, and the ſame day two ſureties entered into a recognizance of 100l. each, to be void, "if *Maximilian Miller*, then a priſoner in "Newgate, did, within the ſpace of fourteen "days from 22d April, tranſport himſelf out of "the kingdom of *Great Britain*, &c. and did not "return, nor was found at large in the kingdom "of *Great Britain* within the term of ſeven years "next enſuing." Upon this recognizance being completed, the Recorder made his warrant to the Keeper of Newgate, by virtue whereof the priſoner was diſcharged out of cuſtody. On the 26th November following he was apprehended in Piccadily, and indicted for a capital offence at the enſuing December Seſſion at the Old Bailey, for

The King's ſign manual may be given in evidence on an indictment for returning from tranſportation; and if the condition of it has been literally complied with, the priſoner ſhall be remitted to his former ſentence.

MILLER'S CASE.

being found at large in Great Britain, *without any lawful cauſe*, before the expiration of his term. The record of his conviction was produced, his perſon was identified, his being at large was proved, and he offered to give in evidence the SIGN MANUAL, with its attendant circumſtances, as above ſtated, in his defence; but the Court thought they were not admiſſible. Upon which the Jury were directed to find the priſoner *Guilty*, ſubject to the opinion of the twelve Judges, upon the following queſtions:

Firſt, WHETHER the SIGN MANUAL ought to have been received in evidence?

Secondly, WHETHER, if it had been received, the priſoner could have availed himſelf of it, as he had not *ſubſtantially* performed the condition of his intended pardon?

No ſolemn adjudication has ever been publicly communicated upon this caſe; but it is reported (*a*), that all the Judges, except L. C. J. *De Grey*, met at Lord *Mansfield*'s chambers on the firſt day of Hilary Term 1772, and that they were unanimouſly of the following opinion:

(*a*) 2 Black. R. p. 797.

Firſt, THAT the SIGN MANUAL ought to have been received in evidence; for although it was only ſignificant of the King's *intention* to pardon, and therefore might be revoked, yet as it was an authority for the Judge to admit the priſoner to bail, it was evidence of a lawful cauſe for his appearing at large.

Secondly, That the SIGN MANUAL was improperly worded, by the miſtake of the officer; for it

MILLER'S CASE.

it ſhould have been, " upon condition of the " ſaid *Maximilian Miller* tranſporting himſelf, " &c. and of his giving ſecurity to the ſatisfacti- " on of the *Recorder;*" and not merely upon condition of his giving ſecurity, *&c.* (*a*) That the King might revoke his intended grace on account of this apparent fraud; but as he had not in fact revoked it, and as the priſoner had *literally* complied with the condition, he ought not to have been convicted upon this indictment.

The priſoner was referred to his original ſentence of tranſportation, as not having performed the condition upon which his pardon was to be granted.

(*a*) In the caſe of *Hatham v. the Eaſt India Company, Hil. Term, 27 Geo.* 3. it was ſaid by the Court, That no preciſe technical words are required in a deed to make a ſtipulation a condition precedent or ſubſequent; neither does it depend upon its being *prior* or *poſterior* in the deed; but that it muſt depend on the nature of the contract, and the acts to be performed by the parties. 1 Term Rep. B. R. 645.

The King *againſt* Varley.

CASE 37.

WILLIAM VARLEY was found guilty at the Lent Aſſizes for *York*, for forging and counterfeiting a forged and falſe coin to the *ſimilitude* of half-a-guinea.

Forging the impreſſion of the current coin on a piece of metal ſo irregular that it will not paſs, is not high treaſon; for the crime is incomplete.

It appeared in evidence, That he had counterfeited the impreſſion of half-a-guinea on a piece of gold which was previouſly hammered, and was not round, nor would paſs in the condition it then was. This, with many others, he delivered

VARLEY'S CASE.

to one *James Green*, who carried them away, and what became of them afterwards could not be proved.

Mr. *Juſtice Gould*, who tried the priſoner, doubting whether this was high treaſon, reſpited the judgment, and laid the caſe before all the Judges; who (*abſente* Baron *Adams*) were unanimouſly of opinion, That the crime was incomplete, and that the priſoner ſhould be recommended to his Majeſty for a pardon.

See Wood drigh... case, post.

CASE 38.

Robert Powel's Caſe.

"As follows" is a ſufficient averment of the tenor of an inſtrument; and in forgery averring a general intent to defraud is ſufficient, without ſetting out the particular mode.

ROBERT POWEL had perſonated one *Taylor Barrow* in the ſale of Eaſt India Stock to a Mr. *Joſeph Sykes*, and had ſigned the uſual receipt upon the transfer with the name *T. Barrow*. *Powel* was convicted of this forgery at the Old Bailey, in May Seſſion 1771, before Mr. Juſtice *Aſton*. The indictment ſimply charged, That he, on ſuch a day, "feloniouſly did falſely make, "forge, and counterfeit, &c. a certain receipt for "money, *as follows, that is to ſay;*" and then ſet out a *fac ſimile* of the receipt. There was alſo in the ſame form, the uſual counts for uttering the receipt, knowing it to be forged; and charging the offence to have been committed with an intention to defraud, 1ſt. *Joſeph Sykes*, 2dly. *Taylor Barrow*, and, 3dly. The *Eaſt India Company*.

Upon the laſt day of the Seſſion, the priſoner's Counſel moved in arreſt of judgment before *James Eyre*, Eſq; Recorder.

Firſt,

First, That it does not appear upon the face of the indictment, that the *tenor* of the receipt is set out; for the words, "*as follows, that is to say*," do not import the *tenor*, or sufficiently shew that the receipt is set out in the *words*, *figures*, and *letters* of it.

Secondly, The possibility of a fraud or injury being committed by means of the receipt depends upon the manner in which it was to operate; and therefore *the mode* of its operation being a material fact, ought to have been distinctly averred in the indictment. For instance, unless Mr. *Barrow* had possessed the stock, the prisoner could not have sold it, and his receipt upon the transfer would have been vain and inoperative. The indictment therefore should have alledged, That *Taylor Barrow* was a proprietor of so much stock; that it had been sold at such a price, and transferred to such a person; but above all, it ought to have averred, that the receipt *purported* to be the receipt, or was intended to pass as the receipt of *Taylor Barrow*; for the Court cannot collect any of these facts from the indictment in its present form. The instrument is set forth under the signature of *T. Barrow* only; and it cannot be collected, or intended to be the receipt of *Taylor Barrow* more than of *Thomas Barrow*, or of any other *Barrow* whose christian name begins with a T.

To afford the prisoner every possibility of advantage from these objections, the judgment was respited, and the case submitted to the consideration of the Judges on the first day of the ensuing Michaelmas Term, at Lord *Mansfield*'s Chambers. All the Judges, except L. C. J. *De Grey*, were present; and upon the *first* objection they were

POWEL'S CASE.

were unanimous, "That a certain receipt for mo-"ney *as follows, that is to say*," is altogether as certain as if it had been ſaid, "*in the words and* "*figures following, that is to ſay.*" As to the *ſecond* objection, ſome of the Judges doubted; but a great majority were of opinion, That in an indictment for forgery, it is ſufficient to aver a general intention to defraud a certain perſon, which intention may be made out by the facts in evidence at the trial.

This caſe was afterwards more ſolemnly argued before all the Judges, except *Blackſtone*, at Serjeants Inn Hall; and they adhered to their former determination.

CASE 39.

Birch and Martin's Caſe.

Indictment for forging a paper writing, purporting to be a will, is good.

EDWARD BIRCH and *Matthew Martin* were convicted at the Old Bailey, in September Seſſion 1771, for forging "a certain paper "writing, *purporting* to be the laſt will and teſta-"ment of Sir Andrew Chadwick, deceaſed."

It was moved in arreſt of judgment, that the indictment ſhould have charged the priſoners with forging "the laſt will and teſtament," &c. and not "a paper writing purporting to "be the laſt will."

In

In Michaelmas Term 1771, the queſtion was argued before all the Judges at Serjeants Inn Hall; and they unanimouſly agreed, That the indictment was perfectly right, and over-ruled the exception. BIRCH and MARTIN'S CASE.

The priſoners were executed at Tyburn on Thurſday January 2, 1772.

Shaw's Caſe.

CASE 40.

AT the Old Bailey, in September Seſſion 1771, *Samuel Shaw* was tried before *James Eyre*, Eſq; Recorder, on the ſtatutes 5 Geo. 3. c. 25. ſ. 17 and 7 Geo. 3. c. 50. which enact, "That if any deputy, clerk, agent, letter-carrier, poſt-boy, or rider; or any other officer or perſon whatſoever employed in receiving, ſtamping, ſorting, charging, carrying, conveying, or delivering letters or packets, or in any other buſineſs relating to the Poſt-Office, ſhall ſecrete, embezzle, or deſtroy any letter, or packet, or bag of letters, which he ſhall be intruſted with, or which ſhall have come to his poſſeſſion, containing any bank note, bank poſt bill, bill of exchange, exchequer bill, South Sea or Eaſt India bond, *&c. &c.* or ſhall ſteal, or take the ſame out of any letter or packet that ſhall come to his poſſeſſion, he ſhall ſuffer death without the benefit of clergy."

A priſoner acquitted on a charge of felony committed as a *ſorter and charger* of letters, cannot be convicted on another count, charging him generally as *a perſon employed in the Poſt-Office.*

The indictment conſiſted of four counts.—

The *firſt* and *third* counts charged him as "a *Clerk employed in* SORTING *and* CHARGING *letters in*

SHAW'S CASE.

in the Poſt-Office," viz. 1ſt. With having ſecreted, embezzled and deſtroyed a certain letter containing a bank note of twenty pounds: 2dly. With having ſtolen the bank note out of the letter.

The *ſecond* and *fourth* counts reſpectively charged him with the ſame offences, "*as being a per-*" *ſon employed in the buſineſs relating to the General* "*Poſt-Office.*"

The fact of embezzling the letter and ſtealing the bank note was very clearly proved; but as it appeared that he was not employed in *ſorting and charging* letters, but in *ſorting* them only, the Jury, by the direction of the Court, found him *guilty* on the *ſecond* and *fourth* counts; and acquitted him on the *firſt* and *third*.

Upon this finding it was moved in arreſt of judgment, That as the Jury had acquitted him on the counts which charged him as *a ſorter* and *charger*, and he had not been proved to be a perſon employed by the Poſt-Office in any other buſineſs than that of *a ſorter*, his conviction could not be ſupported on the *ſecond* and *fourth* counts of the indictment.

During the courſe of Michaelmas Term 1771, this caſe was adjourned to Serjeants Inn Hall, and argued before eleven of the Judges (abſent *Blackſtone*); and they unanimouſly agreed, That the judgment muſt be arreſted for the cauſes above alledged: but they were inclined to think the Jury might have convicted the priſoner on the *firſt* and *third* counts, by a ſpecial finding that he was *a ſorter* only.

The

The priſoner died in Newgate in the month of January 1772. SHAW'S CASE.

Sloper's Caſe.

CASE 41.

AT the Old Bailey, in January Seſſion 1772, *Joſeph Sloper* was indicted on the ſtatutes of 5 Geo. 3. c. 25. ſ. 17 and 7. Geo. 3. c. 50. before Mr. Juſtice *Blackſtone*, for that he being a perſon employed in the buſineſs relating to the Poſt-Office, TO WIT, in ſtamping of letters, feloniouſly did ſecrete a letter *(deſcribing it)* containing a bank-note of ten pounds.

Q. If a ſervant who embezzles letters for the purpoſe of defrauding the Poſt-Office of the poſtage is within 5 Geo. 3. c. 25. ſ. 17.

There were three other counts, which deſcribed him, FIRST, as an officer employed in the buſineſs of the Poſt-Office: SECONDLY, as a perſon employed in facing letters: THIRDLY, as a perſon employed in facing letters and packets. And there was A FIFTH COUNT, which charged him with having ſtolen the letter out of the Poſt-Office, without averring that it contained the bank-note.

It appeared in evidence that he was employed by the Poſt-Office in the ſeveral capacities of an eſtabliſhed porter, ſtamper, facer, and letter-carrier; and that he was apprehended in the very act of ſecreting *a letter (a)*, while he was acting as a *ſtamper*. This detection induced a further enquiry, and upon breaking open a drawer, of which he had a key as letter-carrier, no leſs than 12 paid letters were found in his cuſtody, the poſtage of which had been received by him from the

(*a*) The priſoner was afterwards convicted of ſecreting this letter, containing *two half-guineas*; but this was alſo referred to the Judges. See Skutt's Caſe, poſt.

SLOPER'S CASE.

the different receiving-houſes, at the time he brought away the bags. From this parcel the letter mentioned in the indictment was ſelected. It was proved that 8d. had been paid for the poſtage of it at the receiving-houſe; that the receiver had put it into the paid bag with the reſt of the paid letters; that he ſealed the bags, and delivered it to the priſoner's deputy, who carried the bag with the ſeal unbroke to the Poſt-Office; and that after the Comptroller had broke the ſeal, the letters were turned out on a table, at which the priſoner was employed as a ſtamper and ſorter; and it appeared that the priſoner muſt have got poſſeſſion of it while he was facing the letters, and before it had reached the hands of the proper officer to ſtamp it as a letter "*poſt paid*."

The priſoner's Counſel ſubmitted to the Court, that as it appeared he had not taken the bank-note, or indeed opened the letter, but that his intention was rather to defraud the Poſt-Office of the amount of the poſtage, than to ſteal or embezzle the letter or the note, his caſe was not within the meaning of the ſtatutes on which the indictment was founded *(a)*.

(*a*) See the words of the ſtatutes *ante*, Caſe 40.

The Jury found the priſoner guilty; but the judgment was reſpited, and the caſe referred to the conſideration of the Judges. *For the determination of this caſe, vide* APPENDIX.

James

James Bolland's Caſe.

CASE 42.

AT the Old Bailey, in February Seſſion 1772, *James Bolland* was tried before *James Eyre*, Eſq; RECORDER, preſent Mr. Juſtice *Nares*, for forging on the back of a promiſſory note, for the payment of money, drawn by one *Thomas Bradſhaw*, and indorſed by one *Samuel Pritchard*, a certain indorſement in the name of *James Banks*, with intent to defraud *Francis-Lewis Cardeneaux*. —The note was in the words and figures following.

It is felony to forge the name of a perſon, although ſuch a perſon never exiſted.

" £. 100. LONDON, 12 *October*, 1771.

" TWO MONTHS after date, I promiſe to pay " to Mr. *Samuel Pritchard*, or order, One Hun- " dred Pounds, value received,

" T. BRADSHAW."

" *Charles-ſtreet, Covent-Garden.*

He alſo ſtood charged for uttering and publiſhing as true the ſaid forged indorſement of the name of *James Banks*, knowing the ſame to be forged, with the like intention.

The Jury found the priſoner guilty of uttering and publiſhing the bill, knowing it to be forged; but the Court reſpited the judgment; and it was ſubmitted to the conſideration of the twelve Judges, Whether, under all the circumſtances of the caſe, *Bolland* had been guilty of forgery within the meaning of the ſtatute of 2 Geo. 2. c. 25.

The

BOLLAND'S CASE.

The following circumſtances appeared in evidence.

MONEY tranſactions of a very complicated nature, and to a very large amount, ſubſiſted between *Bolland* and one *Pritchard*. *Bolland* had arreſted him for 2600l. and obtained a judgment for 1498l. 15s. A Mr. *Jeſſon* had diſcounted for *Bolland* a bill upon *Pritchard* of 521. 10s. but neither *Pritchard* or *Bolland* being able to take it up when it became due, it remained unpaid in the hands of *Jeſſon*. In the month of October 1771, *Bolland*, *Jeſſon*, and a Mr. *Lilburne*, met at the George and Vulture Tavern in Cornhill, in a public room. *Jeſſon* aſked *Bolland* when he would ſettle the note of fifty guineas: *Bolland* immediately produced the preſent note for 100l. drawn by *Bradſhaw* payable to *Pritchard*, and indorſed "*James Bolland*," and aſked *Jeſſon* to diſcount it. *Jeſſon* upon obſerving *Bolland*'s indorſement, told him, that as his name was on the back of it, he could not negotiate it; that he knew *Bradſhaw*, and conſidered him as a good man; but that he did not chuſe to put his (*Jeſſon*'s) name on the ſame paper with *Bolland*'s. *Bolland* replied, "I can take off my name." Immediately Mr. *Lilburne* took up one of the table-knives, with intention to eraſe all the name; but when he had eraſed all but the initial B, for he began at the laſt letter of the name, *Bolland* ſaid, "Don't ſcratch it all out, for it may diſfi-
"gure it, or cancel it by ſcratching a hole in it;
"I will think of ſome other name that begins
"with a B;" and he immediately filled it up with "ANKS," which made the name BANKS. When this was done he returned the note to *Jeſſon*, who put it into his pocket, ſaying, "I ſhall give
"it to a particular friend of mine, and he will
"undoubtedly

" undoubtedly aſk me who BANKS is." To this *Bolland* replied, " BANKS is a publican or victu- " aller, and lives near or in Rathbone Place." BOLLAND'S CASE.

The enſuing day *Jeſſon* applied to Mr. *Cardeneaux*, to get this bill diſcounted. *Cardeneaux* took the bill, and promiſed to give *Jeſſon* the money for it on the Friday following. *Jeſſon* having ſome money to make up, applied to *Cardeneaux* on the Thurſday, and borrowed 15l. 16s. on the credit of the bill. On the Saturday morning *Bolland* applied to *Jeſſon*, and inſiſted on having the bill returned, or the amount of it paid to him. *Jeſſon* and *Bolland* went to a Coffee-houſe, and ſent for *Cardeneaux*. He came, and *Jeſſon* introduced him to *Bolland*, as the owner of the bill. *Cardeneaux* enquired of *Bolland* who *Pritchard* the payee and *Banks* the indorſer of the bill were. *Bolland* ſaid, " *Pritchard* is a man extremely well " known; he is a dealer in horſes, and a man " of great property. *Banks* alſo is a man of pro- " perty; he deals largely in wines and ſpirits, " and lives in Rathbone-Place." *Cardeneaux* told *Bolland* that it was not convenient to him to give the whole in caſh; upon which *Bolland* produced another bill of 10l. 10s. and *Cardeneaux* gave him his note for 50l. and a draught upon his banker for 44l. 5s. which with the 15l. 16s. he had paid before to *Jeſſon*, and 9s. diſcount, made up the 110l. 10s. for both the bills.

Cardeneaux never deſired *Bolland* to indorſe the bills; becauſe *Jeſſon* had told him when he gave him the 100l. bill, that it was better *his* name ſhould not appear upon it, he having been formerly a Sheriff's officer; and that the bill would not paſs properly at the bankers with his name on it.

Before

BOLLAND'S CASE.

Before the bill became due, both the drawer *Bradſhaw* and the payee *Pritchard* became bankrupts. Upon theſe events *Cardeneaux* applied to *Jeſſon* for a direction to *Bolland*; and having got it, he ſaid to *Bolland*, "That bill I diſcounted "for you will not be paid." *Bolland* with an air of aſtoniſhment ſaid, "What bill! I never "diſcounted a bill with you, Sir. You miſtake "me. My name is *James Bolland*. I never ſaw "you in my life; and you have no bill with my "indorſement on it." And when *Cardeneaux* inſinuated that he was acquainted with his having altered the name, he treated the idea of its being a forgery with the moſt ſupercilious contempt.

When the bill became due *Bolland* refuſed to pay it, and *Cardeneaux* put it into the hands of a Mr. *Morris*, in order to obtain the money.

While things remained in this ſituation, Mr. *Levi*, an Attorney, two of whoſe clients *Bolland* had deceived, got intelligence from *Pritchard* of the alteration of the name of "*Bolland*" to that of "*Banks*," and he applied to *Cardeneaux* to proſecute, to which *Cardeneaux* conſented. To obtain the note, *Levi* by the deſire of *Cardeneaux* gave Mr. *Morris* an undertaking to deliver up, or to be accountable to him for the bill. *Levi* apprehended *Bolland*, and on his being committed by *Sir John Fielding*, depoſited the note with *Sir John*'s clerk, who produced it at the trial.

After *Bolland*'s commitment, a perſon brought the note to Mr. *Cardeneaux*, in the name of *James Banks*, and he gave him a receipt, the form of which the perſon brought with him, in the name of *James Banks*, containing a promiſe to deliver up the bill no

on demand; the bill being then in the cuſtody of the Magiſtrate. But it did not appear that there ever was in fact ſuch a perſon exiſting at *James Banks* of *Rathbone-Place*. BOLLAND'S CASE.

The opinion of the Judges upon this caſe was never publicly communicated. The principal doubt ſeems to have been, Whether forgery can be committed in the name of a perſon who never had exiſtence? See the caſe of James Cogan, poſt.

Bolland was executed at Tyburn on the 18th May 1772.

Catherine Graham's Caſe. CASE 43.

AT the Old Bailey, in February Seſſion 1772, three men, of the names of *Jennings*, *Birch*, and *Smith*, were tried as principals in ſimple grand larceny, before *Sir James Eyre*, Recorder; preſent Mr. Baron *Smythe*, Mr. Juſtice *Aſhhurſt*, and Mr. Juſtice *Nares*. A relative referring with equal uncertainty to two antecedents will vitiate an indictment.

The indictment contained two counts; the firſt of which charged the priſoners above named with ſtealing *two bank-notes*; and the ſecond charged them with ſtealing *a pocket-book* and other things, the property of *James Madden*, privately from his perſon.

In the ſame indictment one *Catherine Graham* was charged as an acceſſary after the fact, at common law, for harbouring and maintaining the principal

GRAHAM'S CASE.

cipal felons, "ſhe well knowing that the ſaid "*Jennings*, *Birch*, and *Smith*, had committed "*the felony aforeſaid.*" She alſo ſtood charged with receiving the ſaid goods, well knowing them to have been ſtolen.

Birch was acquitted of the whole charge.—*Jennings* and *Smith* were found guilty of ſtealing, but not privately from the perſon. *Catherine Graham* was found guilty of concealing and harbouring the principals.

Sir *James Eyre* ſuggeſted a doubt as to the propriety of the conviction of the acceſſary. The indictment charged the principals with *two diſtinct felonies*; and the acceſſary with harbouring thoſe principals, well knowing they had committed *the felony aforeſaid.* It was therefore uncertain to which of the felonies this charge referred.

The Court concurring in this doubt, the judgment was reſpited, and the queſtion ſubmitted to the conſideration of the twelve Judges. In the June Seſſion following, the judgment was ordered to be arreſted; and the priſoner *Catherine Graham* was diſcharged.

Withal

Withal and Overand's Caſe.

CASE 44.

On an indictment of burglary, the priſoner may be acquitted of the breaking, and found guilty of ſtealing in the dwelling houſe to the amount of forty ſhillings.

AT the Aſſizes at Guildford for the County of Surrey 1772, the priſoners were tried upon an indictment for burglariouſly breaking and entering the dwelling-houſe of *Elizabeth Penifold* of *Croydon*, and ſtealing therein one box, containing ſixty pounds in money, the property of the ſaid *Elizabeth*. There was a ſecond count, the ſame as the firſt, only laying it to be the property of thirty perſons therein named, who held a Club at her houſe.

The evidence was very full againſt the priſoners, as to their ſtealing the box and money, in the dwelling-houſe of *Elizabeth Penifold*, to whoſe care it was entruſted by the members of the Club; but as to the breaking, the evidence was defective.

The verdict was entered upon the record, "Jury ſay, NOT GUILTY of breaking, but GUILTY of ſtealing the box and money in the dwelling-houſe."

Upon this form of entering the verdict, it was objected by the priſoner's Counſel, that they were not excluded from the benefit of clergy, becauſe the Jury had acquitted them of the burglary, and there was no ſeparate and diſtinct count in the indictment on the 12 Anne, c. 7. for ſtealing in the dwelling-houſe to the value of forty ſhillings.

Upon this objection the caſe was reſerved; but THE JUDGES were unanimous, That the priſoners

WITHAL & OVERAND'S CASE.

were by this finding ouſted of their clergy, ſo that the indictment contained every charge that was neceſſary in an indictment upon that ſtatute.

CASE 45.

The King *verſus* Rogers.

The *apartments* of lodgers ſhall be conſidered as their reſpective *dwelling-houſes*, if the owner of the premiſes does not ſleep under the ſame roof.

AT the Old Bailey, in October Seſſion 1772, *William Rogers* was indicted before Mr. Juſtice *Gould*, preſent Mr. Baron *Adams*, for breaking and entering the dwelling-houſe of *Philip Chandler*.

The owner of the houſe had let the whole of it in apartments to different perſons; and did not inhabit any part himſelf. *Philip Chandler* rented the bottom part of the houſe, *viz.* a ſhop and a parlour, and a cellar which run underneath the ſhop and parlour, for 12l. 10s. *per annum*: but the owner had taken back the cellar for the purpoſe of keeping wood and lumber in, for which he gave *Chandler* ten ſhillings a year, which he deducted from the 12l. 10s. The entrance to the houſe was through a paſſage, by a door which opened into and from the ſtreet. In the paſſage another door opened into the parlour; and beyond that a ſtair-caſe led to the upper apartments. The ſhop and parlour were broke open; and it was objected, that this was improperly laid to be the dwelling-houſe of *Philip Chandler*.

On the firſt day of the enſuing Michaelmas Term, Mr. Juſtice *Gould* ſtated this caſe to nine of the Judges (*a*), and they all agreed that it was properly laid. They argued, that it could not be

(*a*) Lord Mansfield, L. C. B. Smythe, Mr. J. Gould, Mr. Juſtice Willes, Mr. J. Blackſtone, Mr. J. Nares, Mr. B. Adams, Mr. L. Perrott, Mr. B. Eyre.

ROGERS's CASE.

be charged to be the dwelling-houſe of the owner, as he did not inhabit any part of it; and if under ſuch circumſtances it was not to be conſidered as the dwelling-houſe of the perſons who rented the apartments, houſes in this ſituation, which are extremely common in London, would be altogether unprotected againſt burglary. But if the owner had inhabited any part of the houſe, it would have been otherwiſe; for then the renters would have been lodgers or inmates, and it muſt have been charged to be the dwelling-houſe of the owner. See *Kelynge*, 83, 84. *Tracey v. Talbot*, 2 *Salk.* 532. *General Ganſel's Caſe*, *Cowper*, 4. *Turner's Caſe*, *O. B. February Seſſ.* 1784. *Fanſhaw's Caſe, and Carrol's Caſe, poſtea (a).*

(*a*) I have been favoured with the following opinion of *L. C. J. Holt* upon this ſubject, from the manuſcript notes of the late *L. C. B. Parker*.—If inmates have ſeveral rooms in a houſe, of which rooms they keep the keys, and inhabit them ſeverally with their families, yet if they enter into the houſe at one outer door with the owner, theſe rooms cannot be ſaid to be the *dwelling-houſes* of the inmates, but the indictment ought to be for breaking the houſe of the owner. Mr. *Tanner*, an ancient clerk of the Court, ſaid, that the conſtant opinion and practice had been according to the opinion of *L. C. J. Kelynge*, which opinion was cited by *L. C. J. Holt* upon this occaſion, at the O. B. October Seſſion, 1701. *See theſe notes referred to in the caſe of Lee and Ganſel, Cowper's Rep.* 2.

CASE 46.

Hugh Lennard's Caſe.

A priſoner may be indicted for having the unlawful cuſtody of a *mould*; for being mentioned in the firſt clauſe of the Act, it is to be conſidered as included in the general words *tool* or *inſtrument*.

AT the Lent Aſſizes for Taunton in the county of Somerſet 1772, *Hugh Lennard* was indicted on 8 and 9 Will. 3. c. 26. for High Treaſon, in having in his cuſtody and poſſeſſion one *mould* made of lead, on which was *made and impreſſed* the figure, ſtamp, reſemblance, and ſimilitude of one of the ſides or flats, *viz.* the head ſide of a ſhilling.

There was another count for having in his cuſtody a mould on which was made or impreſſed the figure, ſtamp, reſemblance, and ſimilitude of the *reverſe ſide* of a ſhilling.

The fact of cuſtody being clearly proved, the Jury found the priſoner guilty. But Mr. Juſtice *Blackſtone*, before whom he was tried, conceiving ſome doubts upon the caſe, he reſpited the judgment till the opinion of the Judges ſhould be taken.

The ſtatute on which the indictment was framed enacts, "That whoever (other than the perſons employed in the Mint) ſhall make, or mend, or aſſiſt, &c. any puncheon, counter-puncheon, matrix, ſtamp, die, pattern, or *mould*, of any materials whatſoever in or upon which there ſhall be, or be made or impreſſed, or *which will make or impreſs* the figure, ſtamp, reſemblance or ſimilitude of both or either of the ſides or flats of any gold or ſilver coin current

rent

" rent within this kingdom." The Act then proceeds through a variety of other clauſes, and concludes, " or ſhall have in their houſes, cuſtody, " or poſſeſſion any ſuch puncheon, counter-pun- " cheon, matrix, ſtamp, dye (omitting the word " *mould*) *or other tool or inſtrument before mentioned*, " ſhall be adjudged guilty of High Treaſon." LEN-NARD'S CASE.

The doubts of the learned Judge aroſe from the words pattern or *mould* being omitted in this latter clauſe of the Act, it being the particular clauſe upon which the indictment was framed. He therefore ſubmitted the following points.

Firſt, Whether the mould found in the cuſtody of the priſoner is comprized under the general words *other tool or inſtrument before mentioned*, ſo as to make the unlawful cuſtody of it High Treaſon?

Secondly, If it be ſo comprized, Whether it ſhould not have been laid in the indictment, to be a *tool or inſtrument* mentioned in the ſtatute?

On the firſt day of Eaſter Term all the Judges, except L. C. J. *De Grey*, met to conſider this caſe; and they were unanimouſly of opinion, That this *mould* was a *tool or inſtrument* mentioned in the former part of the ſtatute, and therefore comprized under theſe general words; and *ſecondly*, as a mould is expreſly mentioned by name in the firſt clauſe of the Act which reſpects the *making* or *mending*, it need not be averred to be a tool or inſtrument ſo mentioned.

But after this opinion was given, a new doubt aroſe upon a different point in this caſe, which was:

Whether,

LENNARD'S CASE.

A mould is an inſtrument on which is *made and impreſſed* the ſimilitude and ſtamp of the current coin.

Whether, as the mould which was found in the priſoner's cuſtody had only the reſemblance of a ſhilling *inverted*, *viz.* the convex parts of the ſhilling being concave in the mould, and *vice verſa*, the head or profile being turned the contrary way of the coin, and all the letters of the inſcription reverſed, ſuch a mould was not properly an inſtrument which would *make and impreſs* the reſemblance, ſtamp, *&c.* rather than an inſtrument on which the ſame *were made and impreſſed*, as laid in this indictment; the ſtatute ſeeming to diſtinguiſh between ſuch as will *make and impreſs* the ſimilitude, *&c.* as the matrix, dye, and mould; and ſuch on which the ſame is *made and impreſſed*, as a puncheon, counter-puncheon, or pattern.

But a great majority of the Judges were of opinion, That this evidence ſufficiently maintained the indictment; becauſe the *ſtamp* of the current coin was certainly impreſſed on the mould in order to form the cavities thereof. They agreed however, that the indictment would have been more accurate, had it charged that "he had in "his cuſtody a mould that would *make and im-* "*preſs* the ſimilitude, *&c.*" and in this opinion ſome who otherwiſe doubted acquieſced.

The priſoner died in gaol before judgment could be pronounced upon him.

Sharpleſs

Sharpleſs and Greatrix's Caſe.

CASE 47.

AT the Old Bailey, in May Seſſion 1772, *John Sharpleſs* and *Samuel Greatrix* were convicted before Mr. Juſtice *Gould*, preſent Mr. Baron *Adams*, of ſtealing ſix pair of ſilk ſtockings, the property of *Owen Hodſon*; but a doubt ariſing whether the offence was not rather *a fraud* than *a felony*, the judgment was reſpited, and the queſtion referred to the conſideration of the Judges upon the following caſe.

A legal poſſeſſion of property cannot be obtained through the medium of a fraud.

Caſe. On the 14th March 1772, *Samuel Greatrix*, in the character of ſervant to *John Sharpleſs*, left a note at the ſhop of Mr. *Owen Hudſon*, a Hoſier in Bridge-ſtreet, Weſtminſter, deſiring that he would ſend an aſſortment of ſilk ſtockings to his maſter's lodgings, at the Red Lamp in Queen-ſquare. The Hoſier took a variety of ſilk ſtockings according to the direction. *Greatrix* opened the door to him, and introduced him into a parlour, where *Sharpleſs* was ſitting in a dreſſing-gown, his hair juſt dreſſed, and *rather more powder all over his face than there was any neceſſity for*. Mr. *Hudſon* unfolded his wares, and *Sharpleſs* looked out three pair of coloured and three pair of white ſilk ſtockings, the price of which Mr. *Hudſon* told him was 14s. a pair. *Sharpleſs* then deſired *Hudſon* to fetch ſome ſilk pieces for breeches, and ſome black ſilk ſtockings with French clocks. *Hudſon* hung the ſix pair of ſtockings which *Sharpleſs* had looked out on the back of a chair, and went home for the other goods; but no *poſitive* agreement had taken place reſpecting

SHARPLESS and GREATRIX's CASE.

reſpecting the ſtockings. During *Hudſon*'s abſence *Sharpleſs* and *Greatrix* decamped with the ſix pair of ſtockings, which were proved to have been afterwards pawned by *Sharpleſs* and one *Dunbar*, an accomplice in ſome other tranſactions of the ſame kind, for which the priſoners were indicted.

1 Show. 55.

The Judges were of opinion, That the conviction was right; for the whole of the priſoner's conduct manifeſted an original and preconceived deſign to obtain a tortious poſſeſſion of the property. The verdict of the Jury imports, That in their belief the evil intention preceded the leaving of the goods; but independent of their verdict there does not appear a ſufficient delivery to change the poſſeſſion.

CASE 48.

Lockett's Caſe.

What ſhall be conſidered as an order for the delivery of goods within the meaning of 7 Geo. 2. c. 22.

AT the Old Bailey, in June Seſſion 1772, *Charles Lockett* was tried before Mr. Baron *Perrott*, preſent Mr. Juſtice *Aſton*, for forging an order for the payment of money: AND ALSO for uttering it, knowing it to be forged, with intention to defraud one *John Scholes*, &c. The order was in the words and figures following.

" Meſſrs.

LOCKETT'S CASE.

LONDON, *February*, 14, 1772.

" Meſſ. *Neale*, *James*, *Fordyce*, and *Down*,

" Pay *to Mr. William Hopwood, or bearer, ſix-*
" *teen pounds ten ſhillings and ſixpence.*

" £. 16. 10. 6. " R. VENNIST."

The priſoner went to the ſhop of Mr. *Scholes*, a Colour-man, and bargained for a quantity of goods, amounting to 1cl. os. 6d. He deſired a bill might be made out, and ſaid he would call in the afternoon and pay for them. He went away, and took a ſmall parcel of Pruſſian blue with him. He returned in the afternoon, ſeemingly in a great hurry; ſaid his name was *William Thompſon*, and that he lived at Ware in Hertfordſhire.—He preſented the order to pay for the goods, and Mr. *Scholes* gave him ſix pounds ten ſhillings in difference; but on preſenting it for payment, no man of the name of *R. Venniſt* had ever kept caſh at the houſe of *Neal*, *James*, *Fordyce* and *Down*.

The Jury found the priſoner *guilty* of uttering the order, knowing it to be forged; but as it appeared that no man of the name of *Venniſt* had ever kept caſh with theſe bankers, it was doubted whether this was an order for the payment of money within the meaning of the 7 Geo. 2. c. 22. the principle of the caſe of *Mary Mitchel* in Mr. Juſtice *Foſter*'s Reports being, That the perſon who is ſuppoſed to give the order ought to poſſeſs ſome intereſt in, or a diſpoſing power over the money or goods which is the ſubject matter of it.

Upon this doubt the caſe was referred to the conſideration of the Judges; and they were unanimouſly of opinion, That it was an order for the payment of money within the meaning of the ſtatute;

LOCKETT'S CASE.

ſtatute; for although no man of the name of *Venniſt* had in fact ever kept caſh at *Fordyce*'s banking ſhop, yet the nature of the order aſſumes that there was caſh there in the name of the drawer, which he hath taken upon him to transfer to the perſon in whoſe favour the order is made *(a)*.

The priſoner received ſentence of death on the laſt day of September Seſſion, 1774; but in the December Seſſion following, received a conditional pardon.

(*a*) To the *Manuſcript Note* from which I have taken this caſe is ſubjoined the following obſervation.—In *M. Mitchel's caſe* the Judges ſeem to have conſidered the meaning of the word "order" as importing *a right* on the part of the perſon who is ſuppoſed to have made it, and *a duty* on the part of the perſon on whom it is made. It follows therefore, that whenever a forged order for the payment of money or for the delivery of goods is drawn in ſuch terms as to induce the world to believe that it *muſt*, in common honeſty, and the regular courſe of things, be complied with, it is within the meaning of the Act; but where it ſeems to leave compliance or refuſal *optional*, and applies rather to the *favour* than the *juſtice* of the perſon to whom it is drawn, it is not within the penalty of the ſtatute; for on ſuch an order the party taking it can place no *reliance*: the terms of it import that compliance *may* be refuſed; and therefore, if it is refuſed, he cannot pretend that he is *deceived*; for a man has no right poſitively to expect performance when requiſition is not *a right*, and performance *a duty*. In this preſent caſe, it is rather *a deſire* that a thing ſhould be done, than *an order* to do it. *A deſire* implies that the party has not *a right*, and it is *the uſurpation of another's right* which the legiſlature intended to puniſh and prevent.

CASE 49.

Lad's Caſe.

An indictment for murder muſt ſtate that the priſoner gave the deceaſed a mortal wound.

AT the Summer Aſſizes at Maidſtone for the county of Kent in the year 1773, *William Lad* was tried for the murder of *Frances Peed*, a female infant of only nine years of age.

The

LAD'S CASE.

The circumſtances of this caſe are too ſhocking to the feelings of modeſty to detail. The priſoner had ſeveral times committed a rape upon the body of the deceaſed, and from his age, violence, and a venereal diſorder, had ſo torn and injured her private parts, that a mortification enſued, which was the cauſe of her death.

The Jury found the priſoner guilty; but as it was an entire new caſe, the judgment was reſpited, and the legality of the indictment ſubmitted to the opinion of the Judges.

On the firſt day of Eaſter Term following, all the Judges, except L. C. J. *De Grey*, aſſembled at Serjeants Inn Hall. They gave no opinion as to the general queſtion, Whether an indictment for murder could be maintained for this offence? but they unanimouſly agreed, That in the preſent caſe the indictment was bad, becauſe it had omitted to aver, "thereby giving the ſaid *Frances* "*Peed* one mortal wound or bruiſe," &c. Some of the Judges thought that it ought alſo to have ſtated that the girl was under ten years of age, as this mean of death could not well be thought murder, if ſhe were above that age, and voluntarily conſented to the raviſhment (*a*).

(*a*) See the ſtatute 18 Eliz. c. 7. which makes it felony without the benefit of clergy, "carnally to know and abuſe any woman "child under the age of ten years;" in which caſe her conſent or non conſent is immaterial. Cro. Car. 332. 3 Burr. 1696. 1 Hale, 631. 4 Bl. Com. 212.

The

CASE 50. The King *verſus* Richard Walker.

A priſoner cannot be convicted on the 16 Geo. 2. c. 31. for facilitating an eſcape, if it appear either by the indictment or on evidence that the commitment was for ſuſpicion only.

THIS was a caſe reſerved by *Thomas Nugent*, Eſq; at the Old Bailey in July Seſſion 1773.

The priſoner was indicted on the 16 Geo. 2. c. 31. for conveying into the priſon of the Poultry Compter a certain inſtrument proper to facilitate the eſcape of priſoners, with intent to aid and aſſiſt the eſcape of *Henrietta Lake*, widow, he well knowing the ſaid *Henrietta* to have been lawfully committed to the ſaid priſon, *upon ſuſpicion* of "forging a promiſſory note of one hundred pounds, with intent to defraud one *Elizabeth Whitelock*," &c.

The Counſel for the priſoner objected to the validity of the indictment, becauſe it appeared upon the face of it that the warrant of commitment was upon ſuſpicion, and the Act of Parliament had only made the offender guilty in caſes where the priſoner "was committed to or detained in any gaol, for treaſon or *felony expreſſed* in the warrant of commitment or detainer;" which could not be conſtrued to extend to a commitment upon *ſuſpicion* only.

Upon this objection the caſe was reſerved for the opinion of the Judges; and they were unanimous (Lord Chief Juſtice *De Grey* abſent), That the indictment was erroneous; for being a parliamentary felony, it was neceſſary that the indictment ſhould ſubſtantially purſue the words of the ſtatute. The two kinds of commitments are eſſentially different from each other; for a priſoner may be admitted to bail on a commitment

ment on ſuſpicion only, but not on a commitment for treaſon, or felony clearly and plainly expreſſed in the warrant. By the words "treaſon or felony expreſſed in the warrant," the legiſlature evidently meant the offence ſhould be "clearly and plainly expreſſed," which can never be the caſe when the commitment is on *ſuſpicion* only (*a*). WALKER'S CASE.

(*a*) At the Lent Aſſizes for Maidſtone, 1785, *John Greeniff* was indicted upon this ſtatute, and it appearing *upon producing the warrant in evidence*, that it was a commitment *on ſuſpicion*, Mr. Juſtice *Gould* reſerved the caſe for the conſideration of the Judges, who were unanimous that it was not within the Act. *M. S.*—At the Old Bailey, in April Seſſion, 1785, *William Gibbons* was indicted for this offence before *Nares*, *J.* but the warrant being *on ſuſpicion of burglary*, the priſoner was acquitted.

Gully's Caſe.

CASE 51.

AT the Old Bailey, in July Seſſion 1773, *Patrick Murphy* and three others were indicted before Mr. Serjeant *Glyn*, Recorder, preſent Mr. Juſtice *Willes*, for a highway robbery, on *Kenneth Mackenzie*, *Eſq.* Earl of *Seaforth*.

A SIGN-MANUAL promiſing a pardon to a convict, will not reſtore him to his competency as an evidence.

The principal witneſs was one *William Gully*, an accomplice, to the competency of whoſe evidence Mr. *Silveſter* objected, upon the ground of his being a convict under ſentence of death; to prove which he produced the record of his conviction in December Seſſion 1772, and a witneſs to identify his perſon.

Mr.

GULLY'S CASE.

Mr. *Lucas*, Counſel for the proſecution, produced the KING'S SIGN MANUAL, under which the priſoner had been diſcharged, on his giving ſecurity to appear and plead the next general pardon that ſhould come out.

But the Court ſaid the objection was incontrovertible, for nothing leſs than a pardon under the great ſeal can reſtore the competency of the witneſs, and it was impoſſible for the Court judicially to take notice of his Majeſty's intention to pardon, which is the extent of what the SIGN MANUAL has ſignified. It was determined by the Judges in the caſe of *the Earl of Warwick*, 11 *Will.* 3. 5 *State Trials*, 166. that if a man be convicted of felony that is within clergy, and prays his clergy and it is allowed, burning in the hand is reſpited, and there is a warrant for his pardon, that he cannot be a witneſs till it has paſſed the great ſeal (*a*), and he has produced and pleaded it *ſub pede ſigilli*; for as it is for his benefit, it is preſumed to be in his cuſtody (*b*), and it would be error to grant him the benefit of it until it has been allowed (*c*); but letters under the KING'S SIGN MANUAL cannot be pleaded as a pardon (*d*).

(*a*) 2 Hawk. 558.
(*b*) Staunf. 103. Cro. Jac. 70, 317. Cro. Car. 441.
(*c*) Cro. Eliz. 153.
(*d*) 1 Bl. Rep. 479. Foſter, 62.

The priſoner was accordingly acquitted.

John

John Sterling's Caſe.

CASE 52.

AT the Old Bailey, in September Seſſion 1773, *John Sterling* was tried before Mr. Juſtice *Nares*, preſent Mr. Juſtice *Aſhhurſt*, and Mr. Serjeant *Glynn*, Recorder, for forging the laſt will and teſtament of *Elizabeth Shuter*, ſpinſter, with intention to defraud the South-Sea Company.

Forgery may be committed of an inſtrument, tho' ſuch an inſtrument as the one forged does not exiſt either in law, or in fact.

There were five other counts for uttering and publiſhing the ſaid will, knowing it to be forged; and charging the priſoner with an intention to defraud, 1ſt, *Elizabeth Shuter*: 2dly, *Daniel Crofts*.

The ſtile of the Company was read from THE CHARTER, which correſponded with the ſtile of the Company as ſet forth in the indictment.

The Circumſtances of this caſe as they appeared upon the evidence were as follow.

The priſoner *John Sterling* was a young man inhabiting chambers in the Temple, and *Elizabeth Shuter* the ſuppoſed teſtatrix of the will was his laundreſs. On the 20th February 1773, the priſoner applied to the clerk of Mr. *Biſhop*, a Proctor in Doctors Commons, in order to prove the will of one Mrs. *Shuter*, deceaſed, whom he repreſented to have lived at Tooting in Surrey. He accordingly

STERLING'S CASE.

accordingly took the oath before the Surrogate, and the probate of the will was accordingly made out and delivered to him (*a*). On the 22d February he took the probate to the South-Sea Houſe, and entered it there with the proper clerks; in conſequence of which on the 25th he went to the proper offices and ſold out 350l. ſtock.

(*a*) At the time of the trial, the probate was not recalled. See the caſe of the King v. Vincent Stringe, and Dutcheſs of Kingſton's Caſe, 11. St. Tr.

The will was produced, in which Mrs. *Shuter* was made to give to her "dear maſter and very "good friend *John Sterling*, of the Middle Temple, ſole executor, 350l. South-Sea annuities, "and all her other eſtate and effects in truſt, to "make ſale of, &c. and out of the money ariſing from ſuch ſale, to pay all her juſt debts, "&c. then to retain to his own benefit 30l. for "his trouble as executor, and divide the reſidue "amongſt her relations," who were ſpecified; and it purported to be ſigned and delivered by her, in the preſence of two witneſſes.

Elizabeth Shuter was herſelf produced to prove that the ſignature to the will was not her handwriting, and the Jury found the priſoner guilty; but the judgment was reſpited upon a doubt, Whether, as the ſuppoſed teſtatrix was living, the priſoner was legally convicted of having forged her *laſt will* and teſtament, there being no ſuch inſtrument as a laſt will and teſtament in contemplation of law until after the death of the perſon making it.

See the caſe of James Bolland and James Cogan, poſt.

But upon the authority of the caſe of *Anne Lecuis*, in Mr. Juſtice *Foſter*'s Reports, THE JUDGES were unanimouſly of opinion, That an inſtrument may be the ſubject of forgery, although in fact it ſhould

ſhould appear impoſſible for ſuch an inſtrument as the inſtrument forged to exiſt, provided the inſtrument purports on the face of it to be good and valid, as to the purpoſes for which it was intended to be made. STERLING'S CASE.

The priſoner received ſentence of death.

Conrad Sheppard's Caſe. CASE 53.

AT the Old Bailey, in October Seſſion 1773, *Conrad Sheppard* was tried before Mr. Serjeant *Glynn*, Recorder, for ſtealing two pounds and a half of hard ſoap, value fifteen-pence, the property of *William Plomer*, *Gabriel Heath*, and *Philip Allen*.

If a Sheriff return the Jury to try an indictment in which he is proſecutor, the objection muſt be made by way of challenge; and cannot be moved in arreſt of judgment.

The priſoner was a weekly ſervant of the proſecutors; and the fact being clearly proved, the Jury found him guilty of ſtealing to the value of ten-pence. When he was called up to receive ſentence, his Counſel objected, in arreſt of judgment, that Mr. *Plomer*, one of the proſecutors, was ſheriff, and had returned the Jury who tried the priſoner; whereas it ſhould in this caſe have been returned by the Coroner, and not by the Sheriff. To ſupport this objection he cited 2 *Hawk. P. C. ch.* 9. *ſ.* 45.

Upon this objection the judgment was reſpited, and the caſe referred to the conſideration of THE TWELVE JUDGES.

SHEPPARD'S CASE.

In a few Seſſions afterwards their opinion was delivered, That the objection came too late in arreſt of judgment; and that it ſhould have been taken by the priſoner by way of *challenge* to the Jurors.

CASE 54.

Thomas Jones's Caſe.

A priſoner *mutus et ſurdus à nativitate*, may be arraigned for a capital offence, if intelligence can be conveyed to him by ſigns or ſymbols.

See poſt. the caſe of Eliz. Steel. See alſo Jan. Seſſ. 1786, where a deaf and dumb perſon was admitted to give evidence. 2 Hawk. P. C. ch. 46. ſ. 28. in notes.

AT the Old Bailey, in December Seſſion 1773, *Thomas Jones* was indicted upon the 12 Ann. c. 7. for ſtealing five guineas, the property of *John Goldwell*, in his dwelling-houſe.

On being put to the bar to be arraigned, he appeared to be deaf and dumb. The Court directed the Sheriff to impannel a Jury; and a Jury being *immediately* returned, they were charged to try, whether the priſoner ſtood mute through obſtinacy, or by the viſitation of God. After hearing evidence, they brought in their verdict, "That he ſtood mute by the viſitation of God." But it appearing that he had for ſome time paſt been in the habit of communicating his ideas with a perſon of the name of *Fanny Lazarus*, ſhe was accordingly ſworn, and examined upon her oath, as to the fact of her being able to make the priſoner underſtand what others ſaid; and it appearing that he was capable of receiving intelligence from her, by means of ſigns, he was arraigned, put upon his trial, convicted of the ſimple larceny, and received ſentence to be tranſported.

The

The King *againſt* Wilkes.

CASE 55.

AT the Aſſizes holden at Warwick on the 3d March 1774, *William Wilkes* was convicted on the ſtatutes of 3 Will. and Mary, c. 9. ſ. 4. and 5 Ann. c. 31. ſ. 5. before Mr. Serjeant *Sayer*, of a miſdemeanour, in knowingly receiving goods which had been ſtolen from one *Richard Innell*. But the judgment was reſpited, and the queſtion, Whether the indictment was maintainable? was ſubmitted to the conſideration of all the Judges (*abſenté* L. C. J. *De Grey*) at Serjeants Inn Hall, on the firſt day of the enſuing Trinity Term, upon the following

In what caſe a receiver of ſtolen goods may be tried for the miſdemeanour, tho' the principal was amenable to juſtice.

CASE.

The ſtatute of 5 Ann. c. 31. ſ. 6. after making it felony to buy and receive ſtolen goods, provides, "that if any principal felon cannot be "taken ſo as to be proſecuted and convicted, it "ſhall and may be lawful to proſecute and pu-"niſh every perſon buying or receiving any goods "ſtolen by ſuch principal felon, knowing the "ſame to be ſtolen, as for a miſdemeanour, al-"though the principal felon be not before con-"victed of the ſaid felony."

It appeared in evidence, that the proſecutor *Richard Innell* was in company with a perſon in London on the third and fourth days of the month of November preceding, who confeſſed himſelf to be the principal felon; and that *Richard Innell* had then an opportunity, on each of thoſe days, of taking the ſaid perſon into cuſtody, but that

WILKES's CASE.

he had voluntarily neglected ſo to do: that no opportunity had ſince that time occurred of apprehending the principal felon; and that he was not taken at the time of finding the indictment.

Foſter, 74, and 373. 2 Hawk. c. 29.

The Judges were divided in their opinions upon this caſe. Many of them thought, that as the principal felon was known, and might have been taken, the conviction was improper, becauſe the ſtatute allows an indictment for the miſdemeanour only, "if the principal felon *cannot be* "*taken.*" But the majority of the JUDGES held, That as it did not appear from the finding of the Jury, that the principal felon could have been taken, *ſo as to be proſecuted and convicted*, the verdict was right (*a*).

The defendant was ſentenced to pay a fine of 300l. and ſuffer one year's impriſonment.

(*a*) But now by 22 Geo. 3. c. 58. receivers of any ſtolen goods and chattels (except lead, iron, braſs, copper, bell-metal, and ſolder, the receiving of which is provided for by the 29 Geo. 2. c. 30.) may be proſecuted for the *miſdemeanour*, although the principal felon be not before convicted, or whether he is amenable to juſtice or not. And upon this Act it hath been determined that the unconvicted principal is an admiſſible witneſs againſt the receiver. Haſlam's Caſe, poſt.

Richard

Richard Cooke's Caſe.

CASE 56.

AT the Lent Aſſizes for the county of Warwick, in March 1774, *Richard Cooke* was tried before Mr. Serjeant *Sayer* on the 14 Geo. 2. c. 6. and 15 Geo. 2. c. 34. for ſtealing A Cow, value 5l. the property of *Edmund Chambers*.

An indictment for ſtealing a cow cannot be ſupported by evidence of ſtealing a heifer.

The larceny was very clearly proved; but it appeared upon the evidence, That the animal ſtolen was a female beaſt of the ox kind, only two years and a half old, that had never had a calf; and that a female beaſt of the ox kind, how old ſoever it may be, is always called AN HEIFER, until it has had a calf.

Upon theſe facts being found, it was ſubmitted by the priſoner's Counſel, that the evidence did not ſupport the charge in the indictment; and therefore the Court ought to direct the Jury to acquit the priſoner. But as the diſcharge of the Grand Jury precluded the poſſibility of preferring *a better* indictment at the then aſſize, the learned Serjeant left the caſe generally with the Jury; and they found the priſoner *guilty*, ſubject to the opinion of the twelve Judges upon the queſtion ſubmitted by the priſoner's Counſel.

The judgment was accordingly reſpited, and the queſtion referred. And all the Judges (*abſenté De Grey*, C. J.) were of opinion, That as the ſtatutes upon which the indictment was founded, have mentioned both *heifer* and *cow*, in deſcribing the ſeveral animals they were deſigned to protect,

COOKE'S CASE.

tect, the *one* muſt have been uſed in contradiſtinction to the *other*; and therefore that the evidence did not ſupport the indictment.

CASE 57.

Skutt's Caſe.

To ſecrete a letter, containing money, is not an offence within the ſtatutes concerning the ſervants of the Poſt-Office.

AT the Old Bailey, July Seſſion 1774, *Timothy Skutt* was tried before Mr. Juſtice *Nares*, preſent Mr. Juſtice *Willes*, and Mr. Serjeant *Glynn*, Recorder, on 5 Geo. 3. c. 25. and 7 Geo. 3. c. 50. for that being a perſon employed in the General Poſt-Office, he did ſteal and take away a certain letter, directed to the Widow *Ball*, at Longbridge in Wiltſhire, and another letter, directed to Mrs. *Wood*, at Harwarders in Flintſhire.

The priſoner was, at the time the fact was committed, a ſorter of letters in the Poſt-Office, and being ſuſpected, he was ſearched, and the two letters mentioned in the indictment found upon him. They were traced to have come into his poſſeſſion as a ſorter of letters; but neither of them contained any ſecurity relating to the payment of money. It was proved however, by the writer of them, that when they were ſealed up, and put into the receiving-houſe, each of them contained a five-and-three-pence in gold coin; and the letters were traced through the hands of the different offices till they came to the poſſeſſion of the priſoner.

The priſoner's Counſel ſubmitted to the Court, that this caſe was not within the Acts *(a)* on which the indictment is founded.

(*a*) See the words of the Acts recited in Shaw's caſe ante, p. 79.

The

The Court were of the ſame opinion, and the priſoner was accordingly acquitted on this indictment; but he was detained, indicted, tried, and convicted of the ſimple grand larceny at common law, in ſtealing the five-and-three-pence; and was tranſported. SKUTT'S CASE.

The King *againſt* Parry and Roberts. CASE 58.

THE priſoners were indicted at the Salop Summer Aſſizes 1774, in ſeparate indictments, upon the ſtat. 26 Geo. 2. c. 19. for feloniouſly plundering and ſtealing divers goods, part of the cargo of the *Charming Jenny*, which was wrecked on the coaſt of *Angleſea*.

A felony committed in Angleſea may be tried in the county of Salop, as the next adjoining Engliſh county to Wales.

The priſoners were found *guilty*, upon very clear evidence; but it was moved in arreſt of judgment, that the offence having been committed in the Iſle of *Angleſea*, the priſoners could not be tried in the county of *Salop*, becauſe the 26 Geo. 2. c. 19. which takes away clergy from this offence, ſays, That where the offence is committed in *Wales*, the proſecution may be carried on in the next adjoining *Engliſh* county; and *Cheſhire*, and not *Salop*, is the next adjoining *Engliſh* county to *Angleſea*.

It was alſo obſerved by the priſoners Counſel, that there is a difference in the penning of 26 Hen. 8. c. 6. ſ. 6. which gives the general juriſdiction to the *Engliſh* Judges to try offences committed in

PARRY & ROBERTS' CASE.

in *Wales*, and that of 26 Geo. 2. c. 19. ſ. 8. the former of which ſays, that the Juſtices of Gaol Delivery, &c. in the ſhire or ſhires of *England* "where the King's writ runneth," next adjoining to the Lordſhip or other place in *Wales* where the offence was committed, ſhall have full power and authority, &c. But the 26 Geo. 2. ſays, the proſecution may be carried on in the next adjoining *Engliſh* county, without adding "where the King's "writ runneth."

To prepare for this objection, the priſoners Counſel had called two witneſſes to prove *Cheſhire* the next adjoining county to *Angleſea*; but two witneſſes were alſo called on the other ſide, who controverted this fact. To give the priſoners, however, the benefit of this objection, if there was any weight in it in point of law, the fact was taken for granted, and the judgment was reſpited till the next aſſizes.

It was accordingly ſubmitted to the JUDGES, Whether the 26 Hen. 8. does not extend to all felonies, though created or made more penal by any ſubſequent ſtatutes? If not, Whether the ſtatute 26 Geo. 2. ſhall not be taken to mean the ſame as 26 Hen. 8.?

The JUDGES were all of opinion, That the conviction was proper, as *Cheſter* is not, properly ſpeaking, an *Engliſh* county, and the king's writ does not run there. Beſides, the words in 26 Geo. 2. "in the next *Engliſh* county," being only a deſcription of the law as it then ſtood, it muſt be conſtrued according to 26 Hen. 8. and the conſtant

Vide Althoe's caſe, 8 Mod 136. 34 and 35 Hen. 8. c. 26.

ſtant practice has been to conſider *Salop* as the next Engliſh county. PARRY & ROBERTS' CASE.

Morris's Caſe. CASE 59.

ROBERT EDWARDS was tried before Mr. Juſtice *Aſhhurſt*, at the Old Bailey, in September Seſſion 1774, for robbing *Thomas Morgan* on the highway of a gold watch, chain, and ſeals; and the ſame indictment charged, "That *Francis* "*Morris*, the goods and chattels above-mention- "ed, ſo as aforeſaid feloniouſly ſtolen, taken, "and carried away, feloniouſly did receive and "have; he the ſaid *Thomas Morris*, then and "there, well knowing the ſaid goods and chattels "laſt mentioned to have been feloniouſly ſtolen, "taken, and carried away."

If an indictment be in itſelf good, tautologous words ſhall be rejected as ſurpluſage.

The priſoners were found *guilty;* but it was moved in arreſt of judgment, that the indictment having alledged that *Francis Morris* had received the property, and that *Thomas Morris* knew it to have been ſtolen, the conviction could not be ſupported as againſt the acceſſary, for that the fact of receiving, and the knowledge of the previous felony, muſt reſide in the ſame perſon; whereas the indictment charged them in two different perſons, one of the name of *Francis*, and the other of the name of *Thomas*.

The point was reſerved for the opinion of THE TWELVE JUDGES, upon the following queſtion, Whether the words "*the ſaid Thomas Morris*" could

MORRIS's CASE.

could be rejected as ſurpluſage? and they were unanimous, That as the indictment would be *ſenſible* and *good* without theſe words, they might be ſtruck out as ſuperabundant and unneceſſary.

CASE 60.

Powell's Caſe.

An infant cannot, under any circumſtances, be admitted to give evidence except upon oath.

THIS was an indictment for a rape, tried before Mr. Juſtice *Gould* at the Aſſize for York, in the year 1775. The proſecutrix was an infant between ſix and ſeven years of age; and upon the preſumption of law, that a child under the age of ſeven years is incapable of underſtanding the nature of an oath, and is therefore incompetent to take it, ſhe was admitted to give her evidence againſt the priſoner without being ſworn, and the priſoner was convicted upon her teſtimony. But the learned Judge conceiving that by the laws of *England* every priſoner muſt be convicted upon legal evidence, and that, eſpecially in criminal caſes, no evidence can be legal unleſs it is given upon oath, he referred the caſe for the opinion of the Judges. The queſtion was under conſideration, and the priſoner was pardoned, but no expreſs opinion was given on the point (*a*).

(*a*) LORD HALE, vol. 1. page 634. ſays, That if an infant appear unfit to be ſworn, the Court ought to hear her *information* without oath; but he admits that ſuch evidence is not of itſelf ſufficient teſtimony to convict, becauſe it is *not upon oath*. In the argument in Omichund v. Barker, Mich. Term 1744, it was ſaid by *L. C. J. Lee*, it was determined at the Old Bailey, upon mature conſideration, that a child ſhould not be admitted as a witneſs without oath; and *L. C. B. Parker* likewiſe ſaid, it was ſo ruled at Kingſton Aſſizes before *Lord Raymond*, where, upon an indictment for a rape, he refuſed the evidence of a child without oath. 1 Atkins, 21. See the caſe of the King v. Steward, 1 Strange, 701. and the King v. Braſier, poſt.

Baker's

Baker's Caſe.

CASE 61.

AT the Summer Aſſize for the county of Somerſet, in the year 1775, *Richard Baker* was tried before Mr. Baron *Burland* for the wilful murder of *Peter Maggs*. The Jury found the priſoner *guilty*; but a queſtion of law having ariſen upon the evidence, the learned Judge reſpited the judgment, and reſerved the caſe for the conſideration of THE TWELVE JUDGES, upon the following circumſtances.

An attachment iſſued and ſigned by the County Clerk, in his own cauſe, is legal proceſs; and if the officer be reſiſted and killed in the execution of it, ſuch homicide will be MURDER.

Baker, the priſoner, was indebted to one *Stringer* in a ſmall ſum of money for fees and diſburſements due to him as Clerk of the County Court; to which office *Stringer* had been regularly appointed by the Sheriff. The priſoner having been ſummoned for this debt, and neglecting to attend, *Stringer*, purſuant to the invariable practice of his office, made out and ſigned, as County Clerk, an attachment, which is the next proceſs to a ſummons, againſt the priſoner; by which the Sheriff commanded *Peter Maggs*, the deceaſed, and others, on the part of the King, to attach the priſoner by his battle, goods and chattels, to appear at the next County Court, to anſwer *Stringer* in a plea of treſpaſs on the caſe.

This attachment, thus made out, and ſigned by *Stringer*, the County Clerk, as plaintiff in his own cauſe, was delivered by him to *Maggs*, an officer of the Court, in order to be executed upon the priſoner *Baker*; and it was proved that the County

BARRR'S CASE. County Clerk is the only officer who makes out the proceſs of the County Court.

On the morning the attachment was made out, one of the officers named in it called at the priſoner's houſe, and aſked him why he did not ſettle with *Stringer*; to which the priſoner replied, That *Stringer* might be *damned*. The officer then told him there was an attachment againſt *him* in the hands of *Maggs*, and that he, as an officer ſpecially named in it, would call on his return with *Maggs* and attach him. The priſoner aſked, what he would attach. The officer replied, "The clock." The priſoner anſwered, "*You* "*may call and be damned; for I'll be ready for* "*you.*" About four o'clock *Maggs* and the other officer went to the priſoner's houſe. *Maggs* alighted from his horſe, in order to go into the houſe to execute the attachment. The front-door of the ſhop was divided into two parts; a hatch below, and an upper part which was open. *Maggs* put his arm over the hatch to open it; upon which a woman in the ſhop, who commonly paſſed for the priſoner's wife, but in fact was not ſo, ſeized *Maggs* by the collar of his coat, and endeavoured to prevent his getting into the ſhop. *Maggs* however puſhed forward, and got beyond the door-way. The priſoner, who was in the ſhop, immediately called to the woman, "Damn "you, *Bland*, ſtand away." *Maggs* anſwered, "The attachment is not againſt *you*; it is againſt "your *goods*." The priſoner replied, "If you "attempt to come one inch further, I'll ſhoot "you." *Maggs* made an effort to go forward, and the priſoner, who was ſtanding at the diſtance of about nine feet, immediately cocked his

his gun at the deceaſed. The deceaſed turned round, and endeavoured to releaſe himſelf from the woman, who was ſtill holding him. He gave her a violent puſh, in order to get away. At that inſtant the priſoner diſcharged his gun, and wounded the deceaſed in the left hip. The woman ſlapped the door to and locked it. The deceaſed exclaimed he was a dead man; and after walking a few ſteps acroſs the ſtreet dropped down. The priſoner then looked out of his ſhop, and ſaid, "*Damn him, I told him I would do for* "*him;*" and on being aſked by a by-ſtander how he came to ſhoot the man? he replied, "I "would do it again upon the ſame provocation." *Maggs* languiſhed two days, and then died. BAKER'S CASE.

The priſoner's Counſel contended, That the proceſs being made by *Stringer*, the County Clerk, *in his own cauſe*, was illegal and void; and therefore the killing of *Maggs*, while he was forcibly attempting to enter the priſoner's houſe to execute ſuch illegal proceſs, could not amount to more than *Manſlaughter*.

On the firſt day of Michaelmas Term 1775, the Judges aſſembled at Serjeants Inn Hall to conſider this caſe; and they were unanimouſly of opinion, That the attachment was legal. The ſuitors are the Judges of the County Court, and the direction of the attachment is in fact the Sheriff's command on the part of the King. In the iſſuing of it the County Clerk acted merely in a miniſterial capacity; and as the death has been occaſioned by unlawfully reſiſting the execution of lawful proceſs, the priſoner has been properly found guilty of the crime of murder. 1 Hale, 463. Strange, 499. 6 St. Tr. 195 Foſter, 29, 135, 308, 319. 9 Co. 66, 68. Cro. Jac. 280, 486. 10 St. Tr. 462. Cowp. 3. 1 Hawk. P C. 129, 132.

The

CASE 62.

The King *againſt* George Williams.

What ſhall be conſidered as an order for the delivery of goods within the 7 Geo. 2. c. 22.

THIS was a caſe reſerved from the Summer Aſſize for the county of Southampton 1775, for the opinion of the TWELVE JUDGES. The indictment was for forgery; and the queſtion was, Whether the following order was an order for the delivery of goods within the meaning of the ſtatute of 7 Geo. 2. c. 22.?

" SIR, *Monday*, 3d *July*, 1775.

" Pleaſe to let the bearer, *Captain George Wil-*
" *liams*, have twelve barrels of tar; and in ſo do-
" ing, you will oblige

" *Your ſervant to command*,

" To Mr. Guildmare, " WILLIAM ROBINSON."
" GOSPORT."

Mr. *Robinſon*, whoſe name was forged, was a cuſtomer to Meſſrs. *Lys Sketley* and *Guildmare*, Merchants in *Goſport*; but it did not appear that he was the owner of, or had any ſpecial intereſt whatever in, the twelve barrels of tar which the order was calculated to procure.

The Judges were unanimouſly of opinion, That this was not an order for the delivery of goods within the meaning of the ſtatute. The caſe of *Mary Mitchell* (a), in Mr. Juſtice *Foſter*'s Reports, they ſaid, had been decided upon ſerious argument

(a) Foſter, 19.

argument by a great majority of the JUDGES, and therefore the principles there laid down could not now be departed from; but moſt of them were of opinion, That had the preſent caſe been *res integra*, they ſhould have thought it within the ſtatute, for the wording of the order was not by any means ſo ſtrong as that in the caſe of *Mary Mitchell (a)*.

BAKER'S CASE.

(a) See Locke's caſe, O. B. June ſeſſ. 1772, ante.

Margaret Caroline Rudd's Caſe.

CASE 63.

EARLY in the month of March 1775, it was diſcovered that three bonds had been forged in the name of *William Adair*, Eſq; of Pall-Mall. The firſt, dated in October 1774, conditioned for the payment of 3300l. A ſecond, dated in December 1774, conditioned for the payment of 5300l. And a third, dated in January 1775, conditioned for the payment of 7500l. Suſpicion fell upon a Mr. *Robert Perreau* of Golden-Square, upon his brother Mr. *Daniel Perreau* of Harley-Street, and upon a Mrs. *Rudd*, who lived with *Daniel Perreau*. On the 15th and 17th of March Mrs. *Rudd* made information before Sir *John Fielding* and two other Juſtices of the Peace, by which ſhe confeſſed that ſhe had ſigned the bond of 7500l. but that ſhe had done it under very particular ſolicitations from *Robert Perreau;* and that he and *Daniel Perreau*, holding a pen-knife to her throat, had violently threatened her life in caſe ſhe refuſed, and by that

An accomplice who has been admitted by the Magiſtrate an evidence for the Crown, is not thereby exempted from proſecution; and it depends upon his making a full diſcloſure of the joint guilt of himſelf and his companions, whether the King's-Bench will admit him *to bail*, that he may apply for a pardon.

RUDD'S CASE.

that means forced her to comply. The Magiſtrates conceiving this to be a confeſſion of her own guilt, admitted her in the character of an accomplice, as a general witneſs for the Crown as to *all* the forgeries; telling her that if ſhe would ſpeak the truth, and the whole truth, not only in reſpect of the bond in queſtion, but of *all other forgeries*, that then ſhe ſhould be ſafe: but ſhe denied having any knowledge of or concern in any of the other bonds. On the 1ſt of June, 1775, *Robert Perreau* was convicted at the Old Bailey, for uttering the bond of 7500l. knowing it to be forged, with intention to defraud Meſſrs. *Drummonds*, the Bankers. On the enſuing day, *Daniel Perreau* was convicted of knowingly uttering the bond of 3300l. with intention to defraud Dr. *Brooke*. It appeared upon *Robert Perreau*'s trial, from the evidence of Mr. *Drummond*, that Mrs. *Rudd* had confeſſed to him that ſhe was guilty of forging the bond of 7500l. and that *Robert Perreau* was innocent. Upon this information the Juſtices of Gaol Delivery iſſued a warrant againſt her, by virtue of which ſhe was committed to Newgate, to anſwer all ſuch matters and things as ſhould be objected againſt her touching the ſaid felony and forgery. On the 7th of June a detainer was lodged againſt her on the oath of Sir *Thomas Frankland*, for forging the bond of 5300l. and on the 3d of July another detainer was lodged againſt her on the oath of *Robert Perreau*'s wife, for having forged the bond of 7500l. Under theſe circumſtances ſhe obtained a *Habeas Corpus* to the Court of King's Bench, with a view to be admitted to bail, and the above commitments were accordingly returned to the Court.

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Trinity Term, 15 Geo. 3.

Mr. *Wallace*, Mr. *Lucas*, and Mr. *Howarth* ſhewed cauſe againſt admitting her to bail; and they contended, *Firſt*, That Juſtices of the Peace have no power to admit an accomplice in forgery as a witneſs for the Crown; forgery not being one of the offences mentioned in the ſtatutes of 10 and 11 Will. 3. c. 23. or 5 Ann. c. 31. *Secondly*, That ſuppoſing forgery were an offence within thoſe ſtatutes, yet the confeſſion of the defendant had gone no further than the bond of 7500l. and was ſilent as to the other two; and as ſhe had not complied with the condition which the ſtatute impoſes, of making a full diſcloſure and diſcovery of all ſhe knew, ſhe was not intitled to any favour or protection in reſpect of the other two bonds.

Mr. *Davenport*, for the defendant, contended, that as ſhe had been admitted an evidence for the Crown by the Juſtices of Peace, and had, under the faith and confidence of that admiſſion, made a diſcloſure of the facts ſhe was acquainted with, it would be a breach of public faith to deprive her of the benefits ſhe was thereby led to expect. He alſo urged the circumſtances of the defendant's health being ſuch as might in all probability be endangered by the confinement, if ſhe was remanded.

Lord Mansfield. It appears by the return to this writ, that the priſoner is detained in cuſtody by two orders of the Court of Seſſions and Gaol Delivery at the Old Bailey, for the forgery of two ſeveral bonds. It appears alſo, that ſhe is further detained by a warrant from a Juſtice of Peace for uttering one of theſe bonds knowing it.

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to be forged: therefore, though this Court has undoubtedly a diſcretionary power to bail in *all* caſes *whatſoever*, yet as the Seſſions are ſo near, and the offence committed by the priſoner is of ſuch a magnitude as that of repeated forgery, there is no colour for the preſent application upon the ground of that general diſcretion. As to the next allegation, that her ſtate of health is ſuch as to be endangered by the confinement, it is not of *itſelf* a ſufficient circumſtance, in ſuch a caſe, to induce the Court to interpoſe in her behalf.

A third ground which has been urged in ſupport of the preſent application, is this: That the priſoner has been drawn in by promiſes and aſſurances to anſwer to an examination, and to ſwear to it on oath, which ſhe would not have done, but from a confidence that thoſe promiſes and aſſurances would have been kept and performed.

The inſtance has frequently happened, of perſons having made confeſſions under threats or promiſes: the conſequence as frequently has been, that ſuch examinations and confeſſions have not been made uſe of againſt them on their trial. But it has been urged, that the priſoner in this caſe is an *accomplice* who has been *admitted* to give *evidence*; that ſhe has already given evidence, and is further ready to give evidence, to convict her partners in the buſineſs; and therefore, that ſhe is entitled by law to the King's pardon, and to a pardon which would operate in bar of her own crime. If ſhe had ſuch a right, we ſhould be bound *ex debito juſtitiæ* to bail her. If ſhe had not

not ſuch legal right, but yet came under circumſtances ſufficient to warrant the Court in ſaying that ſhe had a title of recommendation to the King for a pardon, we ſhould bail her for the purpoſe of giving her an opportunity of applying for ſuch pardon. RUDD'S CASE.

There are *three* ways in law and practice which give accomplices a right to a pardon; and there is *one* mode, which entitles them to a *recommendation* to the King's mercy.

The three legal ways are, *firſt*, in the caſe of *approvement*, which ſtill remains a part of the common law, though, by long diſcontinuance, the practice of admitting perſons to be approvers is now grown into diſuſe: *ſecondly*, the caſe of perſons who come within the ſtatutes 10 and 11 of Will. 3. c. 23. ſ. 5. and 5 Ann. c. 31. ſ. 4. and *thirdly*, the caſe of perſons to whom the King has, by ſpecial proclamation in the Gazette or otherwiſe, promiſed his pardon.

Approvers have a right to a pardon, perſons within the ſtatutes of William and Anne have a right to a pardon, and the other claſs of offenders who come in under the royal faith and promiſe have a right to a pardon; and in all theſe caſes the Court will bail them, in order to give them an opportunity of applying for a pardon.

There is beſide a *practice* which indeed does not give a legal right; and that is, where accomplices having made a full and fair confeſſion of the whole truth, are in conſequence thereof admitted

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mitted evidence for the Crown, and that evidence is afterwards made uſe of to convict the other offenders. If in that caſe they act fairly and openly, and diſcover the whole truth, though they are not entitled *of right* to a pardon, yet the *uſage*, the lenity, and the practice of the Court is, to ſtop the proſecution againſt them, and they have an equitable title to a recommendation for the King's mercy.

The ſtatutes of William and Anne are to be laid out of this caſe: firſt, becauſe they are confined to the diſcovery of particular offences only, of which forgery is not one: ſecondly, becauſe they relate only to perſons who are at large; beſide which, to entitle themſelves to a pardon, they muſt actually *convict* two offenders at leaſt; for if their confeſſion be ſuch on their trial as the Jury gives no credit to, they are liable to proſecution. Theſe ſtatutes are therefore quite foreign to the preſent caſe, as are likewiſe all promiſes of pardon from the Crown by proclamation.

There remains, therefore, only the equitable practice which gives a title to recommendation to the mercy of the Crown.

The law of approvement (in analogy to which this other practice has been adopted, and ſo modelled as to be received with more latitude) is ſtill in force, and is very material.

A perſon deſiring to be an approver, muſt be one *indicted* of the offence, and *in cuſtody* on that indictment: He muſt confeſs himſelf guilty of the

the offence, and *deſire* to accuſe his accomplices: He muſt likewiſe upon oath diſcover, not only the particular offence for which he is indicted, but *all treaſons* and *felonies* which he *knows of*; and after all this, it is in the diſcretion of the Court, whether they will aſſign him a Coroner, and admit him to be an approver or not: for if, on his confeſſion, it appears that he is a *principal* and tempted the others, the Court may refuſe and reject him as an approver. When he is admitted as ſuch, it muſt appear that what he has diſcovered is true; and that he has diſcovered the *whole truth*. For this purpoſe, the Coroner puts his appeal into form; and when the priſoner returns into court, he muſt repeat his appeal, without any help from the Court, or from any by-ſtander. And the law is ſo nice, that if he *vary* in a *ſingle circumſtance*, the whole falls to the ground, and he is condemned to be hanged: if he *fail* in the *colour* of a *horſe*, or in circumſtances of time, ſo rigorous is the law, that he is condemned to be hanged; much more, if he fail in eſſentials. The ſame conſequences follow if he does not diſcover the *whole truth*: and in all theſe caſes the approver is convicted on his own confeſſion. See this doctrine more at large in *Hale's Pleas Crown*, *vol.* 2. *page* 226 *to* 236. *Staunf. Pl. Crown*, *lib.* 2. *c.* 52. *to c.* 58. 3 *Inſt.* 129.—A further rigorous circumſtance is, that it is neceſſary to the approver's own ſafety, that the Jury ſhould believe him; for if the partners in his crime are not convicted, the approver himſelf is executed.

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2 Hawk. 294. Fitz. Cor. 50, 251, 441.

10 Co. 76.

Great inconvenience aroſe out of this practice of approvement.—No doubt, if it was not abſolutely

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lutely neceſſary for the execution of the law againſt notorious offenders that accomplices ſhould be received as witneſſes, the practice is liable to many objections. And though, under this practice, they are clearly competent witneſſes, their ſingle teſtimony alone is ſeldom of ſufficient weight with a Jury to convict the offender; it being ſo ſtrong a temptation to a man to commit perjury, if by accuſing another he can eſcape himſelf.

Let us ſee what has come in the room of this practice of approvement: A kind of *hope*, that accomplices who behave fairly and diſcloſe the whole truth, and bring others to juſtice, ſhould themſelves eſcape puniſhment, and be pardoned. This is the nature of a recommendation to mercy. But no authority is given to a Juſtice of the Peace to pardon an offender, and to tell him he ſhall be a witneſs againſt others. The accomplice is not aſſured of his pardon; but gives his evidence *in vinculis*, in cuſtody: and it depends on the title he has from his behaviour, whether he ſhall be pardoned or executed. A Juſtice has no authority to ſelect whom he pleaſes to pardon or proſecute, and the proſecutor himſelf has even a leſs power or rather pretence to ſelect than the Juſtice of Peace.

It reſts therefore on *uſage*, and on the offender's own good behaviour, whether he ſhall be proſecuted or not. And if, in a proper caſe, an application was to be made to this Court, by an accomplice to be bailed; that is, in the caſe of a perſon properly within the uſage, and who has fully complied with the requiſite conditions; I ſhould

ſhould have no difficulty in bailing him, in order that he might apply for the King's pardon. RUDD'S CASE.

I am appriſed of the caſe of an accomplice upon a trial before Mr. Juſtice *Gould*, the circumſtances of which were as follow: An accomplice made a fair and full diſcovery to the ſatisfaction of Mr. Juſtice *Gould*, who tried the other offenders. The other witneſſes who were called upon the trial, proved the identity of the accomplice by the deſcription of his perſon, but failed as to the identity of the other offenders; and the Jury, becauſe they doubted of the guilt of the others, acquitted them. The Counſel on the part of the proſecution then contended, that the accomplice ought to be tried: but Mr. Juſtice *Gould*, under the circumſtances of the caſe, was of a contrary opinion, and I think very rightly.

Theſe being the general rules, let us ſee how far the preſent caſe is applicable to them, or in any degree falls within the reaſon of them. A bond is detected to have been forged: three perſons are apprehended on ſuſpicion; the two *Perreaus* and the priſoner. The Juſtices by their affidavit ſay, they admitted the priſoner as an evidence againſt the *Perreaus*, and ſwear they conſidered her as an accomplice: and they ſay they told her, "that if ſhe would ſpeak the truth, and "the *whole truth*, not only in reſpect of the bond "in queſtion, but of *all the other forgeries*, that "then ſhe ſhould be *ſafe*; if *not*, ſhe would "be proſecuted." And the truth is, that in point of law, ſhe was liable to be proſecuted for all.

What

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What is the diſcloſure ſhe makes? It is this: "That *Daniel Perreau* came with a knife to her "throat, and threatened to kill her if ſhe did not "forge *one* of the bonds in queſtion: That under "the terror of death ſhe forged it; and that *Ro-* "*bert Perreau* brought the bond before ready "filled up." On this information ſhe is no accomplice; ſhe has confeſſed no guilt, if the fact is true that ſhe was under the fear of immediate death; for it is the will that conſtitutes a crime. She comes therefore in the character of a perſon injured, in the character of one to whom this violence has been done. Inſtead of being a party offending, ſhe is a party *offended*, as much as a man who has been robbed on the highway.—Further, the Juſtices do not treat her as an accomplice; for they ought to have kept her in cuſtody if ſhe had been an accomplice; but they diſcharged her, and they did right, there being no charge againſt her. But ſtill they ſay in their affidavit, they did conſider her as an accomplice. Suppoſe they did really think her guilty, ſhe is not the more or leſs on that account an accomplice. But what is moſt material is, that her information is flatly contradicted by herſelf: for on a voluntary confeſſion of her own, ſhe took the whole guilt upon herſelf; ſaid that ſhe alone forged the bond for 7500l. and that *Robert Perreau* was an innocent man. If the Juſtices had known of this confeſſion, they could not have admitted her as evidence: becauſe by that confeſſion ſhe makes herſelf not only a *principal*, but the *only* perſon guilty.

One of the bonds for which ſhe is now detained, is dated three months prior to the bond in which *Robert Perreau* was concerned. Of this bond

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bond ſhe is totally ſilent, and denies any knowledge of the other two. Her information is therefore falſe, and the conditions offered to her by the Juſtices not complied with.

I agree with Mr. *Davenport*, that if ſhe had made a fair and full diſcloſure of all that ſhe knew, and the Juſtices had deceived her, under a promiſe or aſſurance or hope of a pardon from them, ſhe would be entitled to a recommendation to mercy: and in that caſe I ſhould have been of opinion to bail her, though the Juſtices had in ſtrictneſs no right to make ſuch a promiſe or give her ſuch aſſurance. If any evidence confeſſion has been extorted from her, it is of no prejudice to her on the trial.

The three other Judges concurred; and Mrs. *Rudd* was accordingly remanded.

At the Old Bailey, in September Seſſion 1775, Mrs. *Rudd* was put to the bar, on an indictment for forging the bond of 5300l. But Mr. *Davenport* and Mr. *Cowper* contended, that having been admitted as an evidence for the Crown, ſhe ought not to be put upon her trial. Mr. *Bearcroft*, Mr. *Lucas*, and Mr. *Howarth* ſubmitted to the Court, that the condition upon which ſhe was admitted an evidence was, That ſhe ſhould diſcover *all* the forgeries of which the *perſons* and herſelf had been guilty, but that ſhe had knowingly ſuppreſſed that for which ſhe was at preſent indicted. The Judges (*a*) differed in their opinions upon this ſubject, Mrs. *Rudd* was remanded, and the queſtion ſubmitted to the conſideration of the twelve Judges.

(*a*) Mr. Juſtice Gould, Mr. Juſtice Aſhurſt, Mr. Baron Hotham

Mrs.

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Mrs. *Rudd* was again put to the bar, on the firſt day of December Seſſion following, and Mr. Juſtice *Aſton* delivered the opinion as follows:

Margaret Caroline Rudd, At the laſt September Seſſion, upon your being brought to the bar, to plead to ſeveral indictments found againſt you for forgery, it was inſiſted upon by your Counſel, that in point of law you ought not to have been put upon your trial at all, as you had confeſſed yourſelf to be an accomplice before the Juſtices of Peace for the county of Middleſex, and had been by them admitted as an evidence for the Crown, againſt your companions in guilt *Robert* and *Daniel Perreau*. The ground of that claim was founded upon the ſuppoſed merit of the diſcovery you had made: that being admitted to give evidence as an accomplice, and having performed your engagement to the public, by being examined before the Grand Jury, and being ready to have given evidence upon the trial, if called upon, you was entitled to pardon; or not to have been proſecuted, that you might have time to apply elſewhere: that the conſtant practice in regard to accomplices becoming the King's evidence was, That they ſhould not be proſecuted for the offence they had confeſſed, or ſuch like offences: that a contrary conduct would be a breach of faith with you, and would diſcourage the future diſcovery of criminals, if after ſuch diſcloſures they were nevertheleſs to undergo proſecutions for their offences. To this it was anſwered, that the diſcovery meant by law or practice to intitle an accomplice to favour, muſt be a full, ample, and true diſcovery; and that it would never diſcourage the making ſuch diſcoveries if criminals offering themſelves as witneſſes were

were made to underſtand, that to entitle themſelves to mercy or favour, they are to make a full diſcovery of all the offences about which they were queſtioned, and of all their accomplices in guilt. And it was farther inſiſted, that you had not made a fair diſcloſure, at the time of your examination, of all you knew relative to the forgeries which had been committed and publiſhed, but that you ſtood charged by the Grand Jury with ſeveral other forgeries which you had denied the knowledge of. Upon the debate of this matter before the Bench of Gaol Delivery, the Judges preſent not all concurring in one opinion, and it being judged a point of great weight and importance in the criminal law, fit to be fully conſidered and finally ſettled, how far, under what circumſtances, and in what manner, an accomplice, received as a witneſs, ought to be entitled to favour and mercy; the farther conſideration of the matter was then deferred, in order that the opinion of all the Judges might be taken upon the point of law. RUDD's CASE.

Eleven of the Judges have accordingly met, the Lord Chief Juſtice of the Common Pleas being abſent through indiſpoſition; and have maturely and deliberately conſidered of the matter, under all the circumſtances; and it falls to my ſhare to deliver, in your preſence, to the public, the ſubſtance of their reaſons upon the occaſion, that the ground of their reſolves may be rightly underſtood. All the Judges were of opinion, that in caſes not within any ſtatute, an accomplice, who fully and truly diſcloſes the joint guilt of himſelf and of his companions, and truly anſwers all queſtions that are put to him, and is admitted

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mitted by Juſtices of the Peace as a witneſs againſt his companions, and who, when called upon, does give evidence accordingly, and appears under all the circumſtances of the caſe to have acted a fair and ingenuous part, and to have made a full and true information, ought not to be proſecuted for his own guilt ſo diſcloſed by him, nor perhaps for any other offence of the ſame kind, which he may accidentally, and without any bad deſign, have omitted in his confeſſion; but he cannot by law plead this in bar to any indictment againſt him, nor avail himſelf of it upon his trial; for it is merely an equitable claim to the mercy of the Crown, from the Magiſtrates expreſs or implied promiſe of an indemnity, upon certain conditions that have been performed; it can only come before the Court by way of application to put off the trial, in order to give the priſoner time to apply elſewhere. Nine of the eleven Judges were of opinion, That all the circumſtances relative to a priſoner's claim of indemnity, in ſuch a caſe, not only may, but *ought* to be, laid before the Court, to enable them to exerciſe their diſcretion, whether, upon the grounds before them, the trial ſhould be put off, and conſequently have intimation given that the priſoner ought not to be proſecuted; for the diſcretionary power exerciſed by the Juſtices of the Peace in admitting accomplices to be witneſſes, founded in practice only, cannot controul the authority of the Court of Gaol Delivery, and exempt at all events the accomplice from being proſecuted. Upon every motion made, upon collateral equitable grounds, the Court will ſee and examine into the whole truth, and conſequently ought

ought to be informed of all the circumſtances affecting the caſe. RUDD'S CASE.

The affidavit of the Juſtices, therefore, muſt in this caſe be neceſſarily taken into conſideration, to ſee upon what ground they admitted the priſoner as a witneſs. For if the Court looked no farther than the priſoner's own information, in the preſent caſe, they could not have learnt from thence that ſhe had ever been conſidered as an accomplice at all; and as ſuch have been admitted as a witneſs againſt the *Perreaus*, in either of the proſecutions. Upon their affidavit it appears that the public faith was not engaged but conditionally, and that there was an expreſs admonition given to the priſoner, not to conceal any part of the truth.

The ſame nine Judges alſo were of opinion, that if the matter ſtood ſingly upon the two informations of the priſoner, compared with the indictments againſt her, that ſhe ought to have been tried upon all or any of them; for from the priſoner's information, ſhe is no accomplice; ſhe has not confeſſed herſelf guilty of any offence at all. By their repreſentation, the ſhare ſhe has had in theſe tranſactions is perfectly innocent; but ſhe exhibits a charge againſt *Robert* and *Daniel Perreau*, the one ſoliciting her to imitate the hand of *William Adair*, from a paper he produces; the other forcing her to do the fact of forgery, under the threat and fear of death.—Her two informations are contradictory, and every indictment that is preferred againſt her, proceeds upon a falſification of the account ſhe has given; for ſhe anſwers to the Juſtices interrogation, that ſhe did not know of any other forge-

ries;

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ries; ſo ſhe does not confeſs, make any diſcovery, or become a witneſs concerning theſe offences; and if ſhe has ſuppreſſed the truth, and not made a full and fair diſcloſure, ſhe forfeits all equitable claim to favour and mercy. But if ſhe has *told the truth, and the whole truth*, ſhe cannot be convicted. On the other hand, taking the affidavit of the Juſtices, and all the caſe into conſideration, if ſhe is guilty of the charge contained in the indictments preferred by Sir *Thomas Frankland*, the Judges are of opinion, as her informations before the Juſtices have no relation to theſe charges, they can in no light be applied to mitigate her offences.

Upon the whole, whether the priſoner is guilty or not guilty, is a fact ſtill to be tried by a Jury upon legal evidence only, without prejudice to the priſoner from any thing which has been inſiſted upon in point of law by her Counſel, to exempt her from any trial at all; for it would be hard indeed upon the ſubject, who has a right to advice and aſſiſtance of Counſel in all matters and points of law that may ariſe upon his caſe, if the eventual deciſion of the Court againſt the points of law inſiſted upon in his behalf, ſhould prejudice the ſubſequent trial of the facts, which is ultimately to be governed by the rule of evidence, and to be decided by the verdict of the Jury. I hope and truſt, the facts will be tried without the leaſt attention to, or even a remembrance of, any one matter or thing whatever, which has either made its appearance in print, or been the ſubject of common converſation. I ſhall only add, that an accomplice, who deſires his trial may be put off, that he may apply for mercy under all the moſt regular pretenſions before laid

laid down, confeſſes the guilt; but, under the circumſtances of this caſe, if the priſoner confeſſes theſe indictments, ſhe has no promiſe of mercy, and no claim to favour, for the reaſons aforeſaid. The Judges therefore are of opinion, That the trial ought to proceed; and I have authority to ſay, that the Lord Chief Juſtice of the Common Pleas concurs in that opinion. RUDD's CASE.

In conſequence of this determination, Mrs. *Rudd* was tried by Mr. Juſtice *Aſton*, preſent Mr. Baron *Burland*, and Mr. Serjeant *Glynn*, RECORDER, for forging a certain paper writing purporting to be a bond ſigned, ſealed, and delivered by *William Adair*, Eſq. in the penal ſum of 10,600l. conditioned for the payment of 5300l. with lawful intereſt to *Robert Perreau*, on the 23d of March, 1775, with an intention to defraud, 1ſt, *William Adair*, 2dly, Sir *Thomas Frankland*, Baronet. There were alſo other counts for uttering it with the like intention.

The firſt witneſs produced on the part of the proſecution was *Henrietta Alice Perreau*, the wife of *Robert Perreau*, who was then under ſentence of death for having knowingly uttered the bond of 7500l. Mr. Serjeant *Davy*, the priſoner's Counſel, aſked her, "Is it not your opini- "on, that the fate of your huſband will depend "on the conviction of Mrs. *Rudd?*" To which Mrs. *Perreau* anſwered, "I am not clear of "that." He then aſked, "Do you not hope, "or expect, that the conviction of Mrs. *Rudd* "will be a means of obtaining your huſband's "pardon?" To which Mrs. *Perreau* anſwered, "I have

To give evidence againſt a priſoner, under a hope that the conviction of ſuch priſoner will tend to procure the pardon of a huſband convict, goes to the *credit* and not to the *competency* of the witneſs.

RUDD'S CASE.

" I have nothing but the truth to ſay." On being preſſed to anſwer the queſtion directly, ſhe ſaid, " I do not hope for the conviction of Mrs. " *Rudd*. I hope Mr. *Perreau*'s innocence will " clearly appear." She was then aſked, " Whe- " ther ſhe did not apprehend that Mrs. *Rudd*'s " conviction would contribute to procure her " huſband's pardon?" To which ſhe anſwered, " If Mrs. *Rudd* is found guilty, I ſuppoſe it will. " I hope it may be the means of procuring Mr. " *Perreau*'s pardon."

3 Term Rep. 29.

Upon this evidence it was ſubmitted to the Court, that Mrs. *Perreau* was an *incompetent* witneſs; and the point was elaborately argued by the Counſel on each ſide. But THE COURT were of opinion, That it was not an objection that would go to her *competency*, though it would go very ſtrongly to her *credit*; and her teſtimony was accordingly received.

After a very long trial the Jury brought in their verdict, " *According to the evidence before us*, " NOT GUILTY."

Daniel Perreau and *Robert Perreau*, were executed at Tyburn on Wedneſday the 17th of January, 1776.

The

The King *verſus* Beech. CASE 64.

The word *undertood* inſtead of *underſtood*, held an immaterial variance in an indictment of perjury.

Cowper, 229. Douglas, 194. 1 Term Rep. 237.

IN the King's Bench, Michaelmas Term 15 Geo. 3. the defendant had been convicted of perjury in an affidavit; and a rule had been obtained to ſhew cauſe why the judgment ſhould not be arreſted.

Mr. *Buller* and Mr. *Dunning*, in ſupport of the rule, relied upon a variance between the indictment and the affidavit. In the affidavit the defendant ſwore, that "he *underſtood* and believ-"ed," &c. The aſſignment of the perjury in the indictment was, that "he had falſely ſworn "that he *undertood* and believed," &c. omitting the letter *s*; and they inſiſted that this being a variance in the material part of the charge, *viz.* in the aſſignment of the perjury itſelf, was fatal, and could not be cured by verdict, and cited 2 *Salk.* 660. *Hutton*, 56. *Cro. Jac.* 133. 5 *Co.* 45. *Ld. Raym.* 1224.

Lord Mansfield. This is an application for a new trial in an indictment for perjury, upon the ground of a material variance between the affidavit and the indictment; the letter *s* being left out in the word *underſtood*. We have looked into all the caſes on the ſubject; ſome of which go to a great degree of nicety indeed, particularly the caſe in *Hutton*, where the word *indicari* was written for *indictari*; but that caſe is ſhaken by the

BEECH's CASE.

doctrine laid down in 2 *Hawkins P. C. p.* 239. The true diſtinction ſeems to be taken in the caſe of *The Queen v. Drake*, 2 *Salk.* 660. which is this: That where the omiſſion or addition of a letter does not change the word, ſo as to make it another word (*a*), the variance is not material. To be ſure, a greater ſtrictneſs is required in criminal proſecutions than in civil caſes; and in the former a defendant is allowed to take advantage of nicer exceptions. But this is a caſe where the matter has been fairly tried, and where the omiſſion of the letter *s* certainly does not change the word. Therefore we are all of opinion, That the Jury were very right in reading it "*underſtood*;" and the rule for arreſting the judgment muſt be diſcharged.

(*a*) as "*air*" for "*heir*."

Douglas, 194.

Note. The introductory words in the indictment in this caſe were, "*to the* TENOR *and* EFFECT *following*."

CASE 65.

Captain Roche's Caſe.

The Jury cannot be charged at the ſame time to try the two iſſues of *Autrefois acquit*, and *Not guilty*.

AT the Old Bailey, December Seſſion 1775, *David Roche* was tried before Mr. Baron *Burland*, on a ſpecial commiſſion, preſent Mr. Juſtice *Aſton*, and Mr. Serjeant *Glynn*, Recorder, for the wilful murder of *John Ferguſon*, at the Cape of Good Hope, on the coaſt of Africa.

To this indictment *Captain Roche* pleaded *Autrefois acquit* before *Olaff Martini Bergh*, Provincial

cial Fiſcal of the ſupreme Court of Criminal Juriſdiction there. ROCHE's CASE.

Mr. Serjeant *Davy* for the proſecution moved, that the Jury may be charged at once with this iſſue, and that of *Not Guilty*.

The Court. In pleas in abatement there are two iſſues, and they are always tried upon ſeparate charges to the Jury. Beſides, charging them with both iſſues at once would lead to this abſurdity, that being charged with both, they would be obliged to find upon both; and yet if the firſt finding was for the priſoner, they could not go to the ſecond, becauſe that finding would be a bar. They are diſtinct iſſues, and the Jury muſt be ſeparately charged with them. 2 Hawk. P. C. ch. 35. *paſſim*, and p. 276, 283, 563. Hobart, 270. 1 Bulſt. 141. Yelv. 204. Cro. Jac. 283. 4 Co. 45. Staund. 82. Cro. Eliz. 495. Moor, 457.

The Counſel for the proſecution was therefore ordered to put in a replication; but the priſoner withdrew the plea in bar, and the caſe was tried on the general iſſue.

The priſoner was acquitted.

Joſeph Harris and Thomas Minion's Caſe. CASE 66.

THE Judges met at Serjeants Inn Hall on the firſt day of Hilary Term 1776, to conſider the following caſe, which had been reſerved by Mr. Juſtice *Aſhhurſt* at the Old Bailey during the then next preceding ſeſſion. What evidence is neceſſary to ſupport an indictment for *High treaſon* on 8 and 9 Will. 3. c. 26. ſ. 4.

HARRIS and MINION'S CASE.

It was an indictment conſiſting of two counts, for high treaſon in counterfeiting the coin. The firſt count was framed upon the ſtatute 25 Edw. 3. c. 2. and charged the priſoners with having "coined and counterfeited one piece of the money of this realm called a Shilling." The ſecond count was founded on the ſtatute of 8 and 9 Will. 3. c. 26. ſ. 4. and charged them with having "coined one piece of falſe, feigned, and counterfeit money and coin to the likeneſs and ſimilitude of the good, legal, and current money and ſilver coin of this realm called a Shilling, againſt the duty of their allegiance."

To ſupport theſe charges the following facts were given in evidence. At the time the priſoners were apprehended *Minion* was ſitting by the fire-ſide. *Harris* had a pair of ſciſſars and ſome metal in his hand, which he was clipping into ſlips of more than an inch broad. There was a crucible on the fire, and metal melting in it, a pair of ſcales and weights, with ſome good ſilver lying by them. In a box, with the lid open, were the flaſks and moulds, and ſeveral pieces of baſe metal which appeared to have been caſt in the moulds, for the impreſſions upon ſome of them exactly reſembled that on one of the good ſhillings which was lying near them. In theſe pieces of baſe metal there is a ſmall mixture of good ſilver, which by heating them, and then immerſing them in *aqua fortis* and water, draws out the ſilver upon the ſurface of the metal. But no one piece of baſe metal at preſent found was in ſuch a ſtate as to make it paſſable; for to make ſuch pieces of baſe metal completely reſemble ſhillings, they muſt be rubbed, filed, and thrown into *aqua fortis*.

The

HARRIS and MINION'S CASE.

The learned Judge ſaid, he thought the firſt count in this indictment new and ſingular, and upon enquiry it appeared that it had been now introduced for the firſt time; and that in two inſtances which had lately happened, where the indictment conſiſted of one count only, ſimilar to the ſecond count in the preſent indictment, the Jury, upon evidence like the preſent, had been directed to acquit the priſoners. Upon the authority of theſe two determinations his Lordſhip told the Jury, that in his idea the different formation of the indictment could not vary the nature of the offence, and therefore they ought to find their verdict *Not Guilty*. The Jury however found the priſoners *Guilty* on the firſt count, and acquitted them on the ſecond.

The queſtion ſubmitted to the Judges was, Whether, under theſe circumſtances, the conviction was proper? and they were unanimouſly of opinion, that it was not.

Stephen Self's Caſe.

CASE 67.

If a maſter by premeditated negligence or harſh uſage cauſe the death of his apprentice, it is murder.

AT the Old Bailey, in February Seſſion 1776, *Stephen Self* was tried before Mr. Serjeant *Glynn*, Recorder, for the wilful muder of *William Kingroſe*, his apprentice by means of famine and harſh treatment.

The

SELF'S CASE.

Co. Lit. 295. 3 Inſt. 48, 91. 1 Hale, 425, 432. Palmer, 548. 9 St. Tr. 146. to 251. Pullen, 122. Cromp. 24. 90. 1 Hawk. P. C. 118. 9 Co. 81. Staund. 17. Ld. Ray. 143. Stra. 856, 884.

The *final cauſe* of the death of the deceaſed was a mortification in his legs, the ſeeds of which had originated from the impoveriſhed ſtate of his blood, occaſioned by a long confinement on bread and water in Bridewell. There was ſtrong evidence however that neglected chilblains, and a ſeries of very rigorous and cruel uſage, which he had for a long time endured from his maſter, had been the *efficient cauſe* of his deceaſe.

It was therefore left to the Jury to conſider from which of theſe two cauſes the death proceeded; with an obſervation, that if they thought it had proceeded from the paſſive negligence or active ſeverity of his maſter, ſubſequent to his confinement in Bridewell, the law would imply malice, and the offence would be murder (*a*).

The Jury, feeling the atrociouſneſs of the priſoner's conduct, but doubting whether it had been the cauſe of death, found him guilty of manſlaughter. The Court heſitated a ſhort time as to the propriety of this verdict; but *favorem vitæ* it was at length recorded, and the caſe referred, by the concurrence of Mr. Juſtice *Gould* and Mr. Baron *Hotham*, to the conſideration of the Judges.

The Judges were clearly of opinion, that there was no ground for the verdict, for that it was either murder, or no offence at all; but as the Jury

(*a*) See the trial of *William Wade*, for the murder of *Conſtance Froſt*, his apprentice, for refuſing to allow and give, or to permit and ſuffer to be allowed and given, ſufficient food, drink, and neceſſaries to ſupport life, O. B. February Seſſion, 1784.

had

had thought proper to find it man-ſlaughter, they would not meddle with it; and the priſoner was accordingly burnt in the hand and diſcharged. SELF's CASE.

Girdwood's Caſe.

CASE 68.

AT the Old Bailey, in February Seſſion 1776, *Archibald Girdwood* was indicted on 27 Geo. 2. c. 15. and tried by a Jury of the county of Middleſex, for feloniouſly ſending a certain letter in writing, with the fictitious letters of *J. W.* thereto ſubſcribed and ſigned, to one *John Edridge*, of David-Street, Berkeley-Square, threatening to kill and murder him the ſaid *John*. The contents of the letter were as follow:

In a threatening letter the threat muſt be direct and plain; but the bare delivery of the letter, though ſealed, is evidence of a knowledge of its contents, and the offender may be tried in the county where the proſecutor received it. Cro. Cir. Com. 153. 1 Burn, 293. 1 Hawk. P. C. 226.

" SIR, " *February* 9, 1776.

" I AM ſorry to find a gentleman like you " would be guilty of taking *Mac Alleſter*'s life " away for the ſake of two or three guineas; " but it will not be forgot by one who is but " juſt come home to revenge his cauſe. This " you may depend upon, whenever I meet you, " I will lay my life for him in this cauſe. I fol- " low the road, though I have been out of Lon- " don; but on receiving a letter from *Mac Aleſ-* " *ter* before he died, for to ſeek revenge, I am " come to town. I remain a true friend to *Mac* " *Alleſter*.

" *J. W.*"

It appeared in evidence, that the priſoner had delivered this letter, ſealed up, to one *Elizabeth Robinſon*, at the gate of Newgate; that ſhe immediately

GIRDWOOD'S CASE.

diately carried it to a Penny-Poſt-Office in Newgate-Street, from whence it went regularly, as it was directed, to the proſecutor in David-Street, Berkeley-Square; but there was no proof that it was the priſoner's hand-writing, or that he was acquainted with its contents.

Mr. Baron *Hotham* left it to the Jury, *Firſt*, Whether, from the fact of the priſoner's having delivered the letter to *Elizabeth Robinſon*, they believed that he knew the contents of it? *Secondly*, Whether they thought the terms of the letter conveyed an actual threatening to kill or murder?

The Jury found the priſoner *Guilty;* but the judgment was reſpited, and the following points ſubmitted to the conſideration of the twelve Judges.

Firſt, Whether there was ſufficient evidence to be left to the Jury of the priſoner's ſending the letter, *knowing the contents?*

Secondly, Whether there was ſufficient evidence of its *purporting* to be a letter threatening to kill or murder?

Thirdly, Whether the priſoner was properly tried by *a Middleſex Jury*, the letter having been *delivered* by the priſoner in *London*, and put into a Poſt-Office in *London* by another perſon, from whence the proſecutor received it in *Middleſex?*

On the firſt day of the enſuing Eaſter Term, the JUDGES, being aſſembled at Serjeants Inn Hall, were unanimouſly of opinion, That the conviction

viction was right upon all the points ſubmitted to their conſideration. They thought, however, that the conſtruction which the Jury had given to the letter was rather ſtrained; but as that was a matter which they had under their conſideration, and it had ſo appeared to them, the JUDGES would not interpoſe. GIRDWOOD'S CASE.

The priſoner was executed.

The King *verſus* Garland.

CASE 69.

AT the Gaol Delivery holden at the Caſtle of Taunton, in and for the county of Somerſet, on the 13th of March 1776, before Mr. Baron *Eyre*, and Mr. Baron *Hotham*, *William Garland* was indicted for burglariouſly breaking and entering the dwelling-houſe of *George Shaw* with intent to commit a felony.

An out-houſe ſeparated from the manſion by an open paſſage eight feet wide, and not connected to the manſion by any fence, is not within the curtilage.

The Jury found the following verdict: "That "the priſoner broke and entered, in the night-"time, an out-houſe in the poſſeſſion of *George* "*Shaw*, and occupied by him, with his ſaid "dwelling-houſe, and ſeparated therefrom by an "open paſſage eight feet wide, with intent to "commit a felony: That the ſaid out-houſe is "not connected with the ſaid dwelling-houſe by "any fence incloſing both the ſaid out-houſe and "dwelling-houſe, but whether, *&c.*"

3 Inſt. 64. Cromp. 32. Kely, 27, 52, 82. 4 Bl. Com. 225.

This

GARLAND'S CASE.

This caſe was referred to the conſideration of the JUDGES; and they were unanimouſly of opinion, That from the manner in which the Jury had found the facts, it was impoſſible to conſider this out-houſe as part of the dwelling-houſe; and therefore, as the burglary was the only offence charged in the indictment, the priſoner muſt be acquitted *(a)*.

(a) Domus manſionalis doth not only include the dwelling-houſe, but alſo the out-houſes that are parcel thereof, as barn, ſtable, cow-houſes, dairy-houſes, if they are parcel of the meſſuage, though they are not under the ſame roof, adjoining, or contiguous to it. Co P. C. 64. Dalton, 254. 1 Hale, 558. And it was agreed by all THE JUDGES in the time of *L. C. J. Hyde*, that the breaking and entering, in the night-time, *a bake-houſe*, eight or nine yards diſtant from the dwelling-houſe, and only a pale reaching between them, was burglary. *Caſtle's caſe*, 1 *Hale*, 558. But if the out-houſe be far remote from the dwelling-houſe, ſo as not to be reaſonably eſteemed parcel thereof; as if it ſtands a bow-ſhot off, and not within or near the curtilage of the chief houſe; it is not *domus manſionalis*, nor any part thereof. *Year-Book*, 2 *Edw* 6. *Bro. Cor.* 180. 1 *Hale*, 559. *See alſo Green's caſe, Old Bailey, February Seſſ.* 1789, *before Mr. Baron* THOMSON, *and Mr. Juſtice* GROSE.

CASE 70.

Hart's Caſe.

A variance of "*re-*" "*ceived*" inſtead of "*received*" is not fatal; and the words "*as follows* "*(that is* "*to ſay)*" do not bind the the party to an exact recital. Salk. 660. 2 Stra. 231, 787. Doug. 193. Cowp. 229. 2 Hawk. 616. Ld. Ray. 1515.

AT the Lent Aſſizes for the County of Worceſter, 1776, *Thomas Hart* was tried for forging a bill of exchange, which was ſet forth in the indictment, "*As follows, (that is to "ſay).*"

"*No.* 215. £.42 00 00 *Hull, April* 24, 1775.
"Two Months after date, pleaſe to pay Mr. "*Thomas Jones*, or order, the ſum of Forty-"two Pounds, Value *received*, and place the ſame "to Account of

"GEORGE PRINCE."

"Meſſrs. *Halliday* and *Co.*
"Bankers, *London.*"

with

with intention to defraud one *John Griffith*. There was a ſecond count, for uttering it with the like intention.

HART'S CASE.

Powel's caſe, ante, p. 76. May's caſe, poſt. Beach's caſe, ante, p. 137.

When the bill was produced in evidence, it appeared that the word *received* was ſpelt *receivd*; and it was of courſe objected, that this variance was fatal; for although the two words have the *ſame ſounds*, yet as the proſecutor had undertaken by the words "*as follows (that is to ſay)*" to recite the bill *ſecundum tenorem*, he was bound to do it literally and preciſely.

It was left with the Jury to conſider, whether they thought the two words imported one and the ſame thing; and they found the priſoner *Guilty*, but the judgment was reſpited for the opinion of the Judges.

The JUDGES conceived it to be a proper queſtion for the Jury; for conſidering it as an abbreviation, yet if it meant only the ſame word as that uſed in the indictment, it would not vitiate, for then it could only mean the ſame thing. Mr. Juſtice *Gould* ſaid he conſidered it as the ſame word, only miſ-ſpelt, and that there was not a poſſibility of miſtaking it for any other word in the Engliſh language.

The

Case 71. The Dutcheſs of Kingſton's Caſe, in the Houſe of Peers, April 1776.

A ſentence of jactitation is not concluſive evidence againſt an indictment of bigamy; for its validity may be impeached, as having been obtained by fraud.

A Peereſs convicted of clergyable felony ſhall be diſcharged without burning or imprisonment.

ELIZABETH CHUDLEIGH, daughter of Colonel *Thomas Chudleigh*, of *Chelſea College*, was married to the Honourable *Auguſtus John Hervey* on the 4th of Auguſt, 1744, at the pariſh-church of *Lainſton*, in the county of *Southampton*, as appears by the regiſter of that place.—On the 9th of November, 1768, ſhe inſtituted a ſuit of *Jactitation* of Marriage againſt Mr. *Hervey* in the Conſiſtory Court of the Biſhop of *London*; and on the 10th of February, 1769, ſentence was pronounced, "That the ſaid *Elizabeth* "*Chudleigh* was and now is a Spinſter, and free "from all matrimonial contracts and eſpouſals "with the ſaid *Auguſtus John Hervey*." On the 8th of March, 1769, Miſs *Chudleigh* was married, by ſpecial licence from the Archbiſhop of *Canterbury*, to EVELYN PIERPOINT, *Duke of Kingſton*. And on the 9th January 1775, an indictment of polygamy was found at Hicks's Hall, "That "*Elizabeth*, the wife of *Auguſtus John Hervey*, "Eſq; of Hanover-Square, in the county of "*Middleſex*, being then married, and then the "wife of the ſaid *Auguſtus*, feloniouſly did marry and take to huſband EVELYN PIERPOINT, "*Duke of Kingſton*, the ſaid *Auguſtus John Hervey* being then alive, &c."

On the 18th May 1775, a writ of *Certiorari* was granted by *Lord Mansfield* to remove the proceedings into the Court of King's Bench; but this writ was ſuperſeded; and on 11th November 1776, another writ of *Certiorari*, ſigned "*York*,"

"*York*," iſſued, to remove the proceedings before the King in Parliament.

DUTCHESS OF KINGSTON'S CASE.

On the 15 April 1776, a commiſſion was directed to *Henry* Earl *Bathurſt*, Chancellor, appointing him Lord High Steward of *Great Britain*, and authoriſing him to try the ſaid indictment. The Lords came on the ſame day from their own houſe into the court erected in Weſtminſter-hall; and Her Grace, who had been admitted to bail, appearing at the bar, was deſired to kneel, and in that poſture ſhe was arraigned by the Lord High Steward. The indictment was then read by the Clerk of the Crown, to which the priſoner pleaded *Not Guilty*.

The Dutcheſs of Kingſton immediately ſubmitted to the Court, that as her ſuppoſed marriage with Mr. *Hervey* was the ground of the preſent charge againſt her, the ſentence of the Conſiſtory Court, pronouncing her free from all matrimonial contracts and eſpouſals with him, remaining unreverſed and unimpeached, ought to be concluſive; and that no other evidence ought to be received or ſtated againſt her reſpecting ſuch pretended marriage.

The whole of the proceedings in the Eccleſiaſtical Court, from the libel to the ſentence, were read; and the queſtion, Whether the ſentence was concluſive or not, was very elaborately argued by the Counſel on each ſide (*a*); but the Lords ordered the trial to proceed, and after a hearing of four days, pronounced the priſoner *Guilty*.

(*a*) For the Crown, Mr. At. Gen. Mr. Sol. Gen. Mr. Dunning, Dr. Harris. For the priſoner, Mr. Wallace, Mr. Manſfield, Dr. Calvert, Dr. Wynne.

In conſequence of this verdict, ſeveral queſtions were ſubmitted to the conſideration of the twelve

DUTCHESS OF KINGSTON'S CASE.

twelve Judges, and the following points were reſolved.

Firſt, That a ſentence of the Spiritual Court againſt a marriage, in a ſuit for jactitation of marriage, is not concluſive evidence, ſo as to ſtop the Counſel for the Crown from proving the ſaid marriage in an indictment for polygamy.

Secondly, That, admitting ſuch ſentence to be concluſive upon ſuch indictment, the Counſel for the Crown may be admitted to avoid the effect of ſuch ſentence, by proving the ſame to have been obtained by fraud or colluſion.

2 Hawk. 475.

Thirdly, That, by the ſtatute 1 Edw. 6. c. 12. ſ. 16. *a Peer* convicted of a clergyable felony is intitled to his immediate diſcharge, without reading or burning in the hand, or being liable to impriſonment by the 18 Eliz. c. 4. ſ. 3. AND THAT this privilege given by ſtatute being ſuch as may be enjoyed by *a Peereſs*, is by operation of law communicated to her, and puts her in the ſame ſituation as a *Peer*. The conſequence of which is, that a *Peereſs* convicted of a clergyable felony, praying the benefit of this ſtatute, is not only excuſed from capital puniſhment, but ought to be immediately diſcharged, without being burnt in the hand (*a*), or liable to any impriſonment.

(*a*) See 5 Ann. c. 6. and the 19. Geo. 3. c. 74. ſ. 3.

The priſoner was accordingly diſcharged.

John

John Brown's Caſe.

CASE 72.

AT the Summer Aſſize in 1776 for the County of ——— *John Brown* was tried and convicted, before Mr. Juſtice *Gould*, for the wilful murder of *John Moncaſter*. Man-ſlaughter.

It had been argued by the priſoner's Counſel, that the offence was only *Manſlaughter*, and the learned Judge concurring in that opinion had ſo directed the Jury; but they thought fit to find the priſoner guilty of *murder*, and perſiſted in their verdict. Sentence of death was accordingly paſſed upon him; but he was reprieved from execution, until *the evidence* which had been given againſt him was ſubmitted to the conſideration of the TWELVE JUDGES; and on the firſt day of the enſuing Michaelmas Term, the caſe was ſtated at Serjeants Inn Hall to the following effect. 3 Inſt. 55. 1 Hale, 466. 4 Bl. Com. 186. 191. 5 Burr. 2799. Foſter 278, 29. Ld. Ray. 1496. Stra. 481. Cowp. 132. 1 Hawk. P. C. 125.

The Caſe. The priſoner was a common ſoldier, in a regiment of foot commanded by Captain *Peter Hunter*, and was, at the time mentioned in the indictment, on a recruiting party at *Sandgate*. In this character he had behaved during the courſe of five years with great propriety as a ſoldier, and with good-nature and humanity as a man. On the 26th June 1776, he went with ſeveral of his comrades into a public-houſe in *Sandgate* kept by one *Meggiſon*, to drink. This was between one and two o'clock in the morning. A quarrel aroſe ſoon after between the ſoldiers and a number of keelmen who were in the houſe. They went out into the ſtreet, and a violent affray enſued, which occaſioned a great tumult of men, women,

BROWN'S CASE.

women, and children. Between two and three o'clock one of the ſoldiers was ſeen ſtripped, and a party of five or ſix came up, fell upon him, and beat him cruelly. A woman called out from a window, "You rogues, you will murder the "man." The priſoner, who had before, with his ſword in the ſcabbard, driven a part of the mob down the ſtreet, returned; when ſeeing his comrade thus uſed, he drew his ſword, which he brandiſhed in the air, and deſiring the mob to ſtand clear, ſaid, "There it is, I'll ſweep the "ſtreet." The mob preſſed in upon them, and he ſtruck at them with the flat ſide ſeveral times. The mob then fled, and he purſued one of them down the ſtreet to a place called THE SWELL. The ſoldier who was ſtripped got up, and ran into a paſſage to ſave himſelf. The priſoner returned, and aſked if they had murdered his comrade. The people came back and aſſaulted him ſeveral times, and then ran from him. He ſometimes brandiſhed his ſword, and then ſtruck fire with the blade of it upon the ſtones of the ſtreet, calling out to the people to keep off. At this time the deceaſed, who had a blue jacket on, and might be miſtaken for a keelman, was going along about five yards from the ſoldier; but, before he paſſed, the ſoldier went to him, and ſtruck him on the head with his ſword. The deceaſed ran ſome paces and fell down, roſe again, ran a few paces further out of the priſoner's ſight, fell down again, and immediately expired. The mob ran into the paſſages near THE SWELL. The ſoldier ſaid he had been badly uſed; and it was the opinion of two witneſſes, that "if he had not drawn his ſword, "they would both of them have been mur-"dered."

The

The Judges were clearly of opinion, That it was only manſlaughter. BROWN's CASE.

William Akehurſt's Caſe.

CASE 73.

The ſuppoſed drawer of a promiſſory note, *unindorſed* and not payable *to order* having received a general releaſe from *the holder*, is a competent witneſs to prove the forgery.

AT the Summer Aſſize for the County of Suſſex, in the year 1776, *William Akehurſt* was tried before *Lord Mansfield*, for forging a promiſſory note, payable to the ſaid *William Akehurſt*.

It appeared in evidence, that the note was not made payable *to order;* that the priſoner had paid it away to a perſon in part diſcharge of a debt which had been long contracted; but that he had *not indorſed it*.

The holder of the note gave a general releaſe to the drawer of it, whoſe name was charged to be forged; and the queſtion was, Whether ſuch ſuppoſed drawer was, under this releaſe, a competent witneſs to prove the forgery?

Lord Mansfield, after the point had been debated at the bar, received the evidence, and the priſoner was convicted.

The priſoner received judgment, but was not executed.

CASE 74.

The King *againſt* Alford.

An indictment for perjury at an Aſſize, may alledge the oath to have been taken before *one* of the Judges in the commiſſion, tho' the names of *both* are inſerted in the caption.

THIS was an indictment for perjury at the Summer Aſſizes for Somerſet 1776, in a cauſe which had been tried at a previous aſſize. In the caption of the indictment the names of *both* the Juſtices then in the commiſſion were mentioned; and then it went on, "And the Ju-"rors aforeſaid, now here ſworn, on their oath "aforeſaid, do further preſent, that at the ſaid "trial ſo then and there had as aforeſaid, *John* "*Alford*, *&c.* appeared as a witneſs upon the "ſaid trial, and was ſworn, and took his corpo-"ral oath before the Honourable *Edward Willes*, "one of the Juſtices aforeſaid, on the Holy Goſ-"pel of God, &c. he the ſaid *Edward Willes* "then and there having competent authority to "adminiſter an oath to the ſaid *John Alford* in "that behalf," &c. It then ſet forth the evidence before the ſaid *Edward Willes*, and aſſigned the perjury.

The Jury found the priſoner guilty; but Mr. Baron *Eyre*, who tried the indictment, expreſſed ſome doubt, Whether one Commiſſioner of Aſſize alone had competent authority to adminiſter the oath; and therefore conceived the indictment ought to have alledged, That the oath was taken before *both* the Juſtices then in the commiſſion.

Another doubt alſo aroſe, Whether the evidence maintained the indictment? the *niſi prius* record of the cauſe in which the perjury was committed, ſtating in the uſual form, that the trial was before both the Judges.

The

The caſe was therefore reſerved; and on the firſt day of Hillary Term 1777, the Judges were unanimouſly of opinion, That the conviction was good. ALFORD'S CASE.

The King *verſus* Snow. CASE 75.

THE following caſe was ſubmitted to the conſideration of the twelve Judges, at Serjeants Inn Hall, on the firſt day of Michaelmas Term 1776, by Mr. Juſtice *Willes*. Manſlaughter.

At the preceding Summer Aſſizes for Northampton, *William Snow* was indicted for the murder of *Thomas Palmer*. It was queſtionable from the evidence, whether the crime amounted to murder, or to manſlaughter; and Mr. Serjeant *Vaughan*, at the requeſt of the learned Judge, came into court, and argued the point of law in favour of the priſoner, with great ability. The Jury however thought that there appeared to be an *implied malice* in the priſoner's behaviour, and they accordingly found him guilty of murder. But the judgment was reſpited, in order to take the opinion of the Judges, Whether this conviction was warranted by the circumſtances of the caſe? See the caſe of John Brown, ante p.151. and the caſes there cited.

Caſe. *William Snow* was a ſhoe-maker; and *Thomas Palmer* a labouring man. They lived in the ſame neighbourhood; and at no great diſtance from each other. On the afternoon of the day mentioned in the indictment, the priſoner,

SNOW'S CASE. very much intoxicated by liquor, paſſed accidentally by the houſe of the deceaſed's mother, while he was thatching an adjacent barn. They entered into converſation; but on the priſoner's abuſing the mother and ſiſter of the deceaſed, very high words aroſe on both ſides, and they placed themſelves in a poſture to fight. The mother of the deceaſed hearing them quarrel, came out of her houſe, threw water over the priſoner, hit him in the face with her hand, and prevented them from boxing. The priſoner went into his own houſe, and in a few minutes came out again, and ſet himſelf down upon a bench before his garden-gate, at a ſmall diſtance from the door of his houſe, with a ſhoe-maker's knife in his hand, with which he was cutting the heel of a woman's ſhoe. The deceaſed having finiſhed his thatching, was returning in his way home by the priſoner's houſe. On paſſing the priſoner as he ſat on the bench, the deceaſed called out to him, "Are not you an aggravating raſcal?" The priſoner replied, "What will you be, when "you are got from your maſter's feet?" On which the deceaſed ſeized the priſoner by the collar, and dragging him off the bench, they both rolled down into the cartway. While they were ſtruggling and fighting, the priſoner underneath and the deceaſed upon him, the deceaſed cried out, "You rogue, what do you do with that "knife in your hand?" and made an attempt to ſecure it: but the priſoner kept ſtriking about, and held the deceaſed ſo hard that he could not diſengage himſelf. The deceaſed however made a vigorous effort, by which means he drew the priſoner from the ground, and during this ſtruggle the priſoner gave a blow; on which the deceaſed immediately exclaimed, "The rogue has "ſtabbed

" ſtabbed me to the heart, I am a dead man!" and expired. Upon inſpection it appeared that he had received three wounds; one very ſmall on his right breaſt; another on the left thigh, two inches deep, and half an inch wide; and the mortal wound on his left breaſt. SNOW'S CASE.

The Judges after great argument and conſideration determined, That the offence was manſlaughter only.

Lavey and Parker's Caſe.

CASE 76.

AT the Old Bailey, in December Seſſion 1776, *William Lavey*, and *Elizabeth Parker* were indicted before Mr. Baron *Hotham*, on the 8 and 9 Will. 3. c. 26. ſ. 4. for felonioufly and traitorouſly colouring with a waſh, and materials producing the colour of ſilver, one round blank of baſe metal, of a fit ſize and figure to be coined into counterfeit milled money, reſembling the ſilver coin of this kingdom called a ſixpence.

Extracting latent ſilver from the body of baſe metal by means of *aqua fortis*, is a colouring within the 8 and 9 Will. 3. c. 26. ſ. 4.

The Jury found the priſoners guilty upon very clear and ſatisfactory evidence; but it appeared that the colour of ſilver was produced by melting a ſmall portion of good ſilver with a large portion of baſe metal, and throwing it, after it had been cut into round blanks, into *aqua fortis*, which draws to the ſurface whatever ſilver there is in the compoſition, and makes it aſſume the colour and appearance of real ſilver. A doubt therefore aroſe, Whether this was " colouring

" with

LAVEY & PARKER'S CASE.

" with a waſh and materials," within the meaning of the ſtatute? or, Whether the legiſlature did not intend ſuch a colouring only, as is produced by a ſuperficial application?

Upon this doubt the queſtion was referred to the conſideration of the Judges. The words of the Act are, " that whoſoever ſhall colour, gild, " caſe over with gold or ſilver, or with any waſh, " *or materials producing the colour of gold or ſilver*, " any coin reſembling any of the current coins " of this kingdom, or any round blanks of baſe " metal, or of coarſe gold, or coarſe ſilver, of a " fit ſize and figure to be coined into counter- " feit milled money reſembling any of the gold " or ſilver coin of this kingdom, ſhall be guilty " of high treaſon." And they were unanimouſly of opinion, That this proceſs of extracting the latent ſilver from the body to the ſurface of the baſe metal by the power of *aqua fortis*, was a colouring within the words, " materials produc- " ing the colour of ſilver."

The priſoners received judgment of death (*a*).

(*a*) *Sed quære.* See Seſſ. Papers December Seſſ. 1776, where it is ſaid that the judgment was arreſted.

Doctor

Doctor Dodd's Caſe.

CASE 77.

AT the Old Bailey, in February Seſſion 1777, *William Dodd*, Doctor of Laws, was indicted on the ſtatute of 2 Geo. 2. c. 25. for forging a certain paper writing, *purporting* to be a bond in the penal ſum of 8400l. and to be ſigned by the *Earl of Cheſterfield*, with the name of "CHESTERFIELD," and to be ſealed and delivered by the ſaid Earl: AND ALSO, for forging a certain paper writing, *purporting* to be an acquittance and receipt for money *(to wit)* 4200l. and to be ſigned by the ſaid *Earl of Cheſterfield* with the name "CHESTERFIELD."

An accomplice may give evidence before a Grand Jury to ſupport an indictment againſt a *particeps criminis*; and a bill ſo found is good, although the accomplice was not previouſly admitted an evidence for the Crown, and was carried from priſon before the Grand Jury by means of a ſurreptitious and illegal order.

The indictment conſiſted of eight counts, charging the priſoner with having knowingly uttered and publiſhed as true the ſaid paper writings; and laying the offence to have been committed with an intention to defraud, *firſt*, the *Earl of Cheſterfield*, and *ſecondly* Mr. *Henry Fletcher*.

The names of *William Dodd* and one *Lewis Robertſon* were ſubſcribed both to the bond and to the receipt, as atteſting witneſſes of the ſignature "CHESTERFIELD." The proſecutors charged them with being equally guilty of the forgery; and from the evidence which was given againſt them on their examination before a magiſtrate, he committed them to Newgate, as principals in the ſame felony; and bound the *Earl of Cheſterfield* and other witneſſes in a recognizance to appear againſt, and proſecute both of them as principals in the ſame degree.

A Bill

DODD'S CASE.

A Bill of indictment was preferred at the enſuing Seſſion at Hicks's Hall, before the Grand Jury for the County of Middleſex, againſt *William Dodd* only; and the agents for the proſecution obtained an order from Mr. *Deacon*, the Clerk of the Arraigns, at the Old Bailey, dated the 19th of February, 1777, and directed to the Keeper of Newgate, commanding him to carry *Lewis Robertſon* before the Grand Jury at Hicks's Hall, for the purpoſe of giving evidence in ſupport of the indictment againſt *William Dodd;* and by virtue of this order he was removed to Hicks's Hall, and examined before the Grand Jury accordingly.—The bill was found "*a true bill*," and the name of *Lewis Robertſon* indorſed among others, on the back of it, as a witneſs for the Crown. On the 21ſt of February, the Juſtices of Gaol Delivery at the Old Bailey, being informed of the order which Mr. *Deacon* had made, and of the tranſaction which had taken place in conſequence of it, made another order, declaring that the order of the 19th February had been ſurreptitiouſly obtained, and that it was *illegal* and *void*.

Doctor Dodd, on being called to arraignment on this indictment, ſubmitted to THE COURT, That as *Lewis Robertſon* was in cuſtody under a legal warrant of commitment, as a principal in the offence with which *he* was charged, and, without having been admitted a witneſs for the Crown by any legal authority, had been carried before and examined by the Grand Jury, by virtue of a ſurreptitious and illegal order, the indictment againſt *him* had been found upon improper evidence, and therefore he ought not to be compelled to plead to it.

The

The point was argued before Mr. *Juſtice Gould*, Mr. *Juſtice Willes*, and Mr. *Baron Hotham*, by Mr. *Howarth*, Mr. *Cowper*, and Mr. *Buller*, Counſel for the priſoner, and by Mr. *Mansfield* and Mr. *Davenport*, for the Crown. DODD'S CASE.

It was however ultimately agreed that the trial ſhould proceed; and, on the Jury finding the priſoner GUILTY, the ſentence was reſpited, and the queſtion ſubmitted to the conſideration of the TWELVE JUDGES.

On the firſt day of May, Seſſion following, Mr. *Juſtice Aſton* delivered the reſult of their conference to this effect:—" The Judges have met, and have fully conſidered the whole matter of this objection; and they are unanimouſly of opinion, That the neceſſity of ſome proper authority to carry a witneſs, who happens to be in cuſtody, before the Grand Jury to give evidence, regards the juſtification of the Gaoler only; but that no objection lies upon that account in the mouth of the party indicted; for in reſpect to him, the finding of the bill is right and according to law.

" Whether a private proſecutor, by uſing an accomplice in or out of cuſtody as a witneſs, gives ſuch a witneſs a plea not to be proſecuted *(a)*, or can entitle the proſecutor himſelf to have his recognizance diſcharged, is a matter very fit for conſideration, under all the circumſtances of the particular caſe where that queſtion ſhall ariſe; but it is a matter in which the party indicted has no concern, nor can he make any legal objection to the producing ſuch a perſon as a witneſs, for the accomplice is againſt him a legal and a competent

(*a*) See the caſe of Mrs. Rudd, ante, p. 119.

DODD'S CASE.

tent witneſs; and ſo was *Lewis Robertſon* upon the bill of indictment found upon this occaſion.

"The Judges therefore are of opinion, That the proceedings upon that indictment were legal, and that the priſoner was convicted according to law."

Sentence of death was paſſed upon the priſoner, on the laſt day of the Seſſion, and he was executed at Tyburn accordingly.

The ſuppoſed obligor of a forged bond being releaſed by the obligee, is a competent witneſs.

The Earl of *Cheſterfield* was produced a witneſs on the trial, to prove that the name "CHESTERFIELD" was not his ſignature; and on producing a releaſe from Mr. *Henry Fletcher*, the ſuppoſed obligee of the bond, he was admitted to give his evidence.

Platt's

Platt's Caſe.

CASE 78.

A priſoner committed for high treaſon in North America, who is only triable before the King's-Bench, or under a ſpecial commiſſion, cannot be admitted to bail under the *Habeas Corpus* Act, by Juſtices of Gaol Delivery, or diſcharged by their proclamation for want of proſecution.

OLD Bailey, February Seſſion 1777. The priſoner had been committed to the gaol of Newgate on the 23d January 1777, by virtue of the following warrant,

" Middleſex } " To the Keeper of his Majeſty's
" to wit } " Gaol of Newgate, or his De-
" puty.

" Theſe are in his Majeſty's name to autho-
" riſe and require you to receive into your cuſto-
" dy, the body of *Ebenezer Smith Platt*, here-
" with ſent you, charged before me, upon the
" OATH of *Richard Scriven* and *Samuel Burnet*,
" with HIGH TREASON at Savannah in the Co-
" lony of Georgia, in North America. And
" you are to keep him ſafe, until he ſhall be de-
" livered by due courſe of law; and for ſo doing
" this ſhall be your ſufficient warrant.

" W. ADDINGTON."

By the Habeas Corpus Act, 31 Car. 2. c. 2. ſ. 7. it is enacted, " That if any perſon or perſons
" committed for high treaſon or felony, plainly
" and ſpecially expreſſed in the warrant of com-
" mitment, upon his prayer or petition in open
" Court, the firſt week of the Term, or *firſt day*
" of the Seſſions of Oyer and Terminer, or Ge-
" neral Gaol Delivery, to be brought to his trial,
" ſhall not be indicted ſome time in the next
" Term, Seſſions of Oyer and Terminer, or Ge-
" neral Gaol Delivery, after ſuch commitment;
" it ſhall and may be lawful to and for the Judges
" of the Court of King's Bench, and Juſtices of

" Oyer

PLATT'S CASE. " Oyer and Terminer, and General Gaol Deli-
" very, and they are hereby required, upon mo-
" tion to them made in open Court, the laſt day
" of the Term, Seſſions, or Gaol Delivery, ei-
" ther by the priſoner, or any one on his behalf,
" to ſet at liberty the priſoner upon bail, unleſs
" it appear to the Judges and Juſtices upon oath
" made, that the witneſſes for the King could
" not be produced the ſame Term, Seſſions, or
" General Gaol Delivery; and if any perſon or
" perſons committed as aforeſaid, upon his prayer
" or petition in open Court, the firſt week of
" the Term, or firſt day of the Seſſions of Oyer
" Terminer and General Gaol Delivery, to be
" brought to his trial, ſhall not be indicted and
" tried the ſecond Term, Seſſions of Oyer and
" Terminer, and General Gaol Delivery, after
" his commitment, or upon his trial ſhall be ac-
" quitted, he ſhall be diſcharged from his im-
" priſonment."

Provided, " That if any perſon or perſons at
" any time reſident in this realm, ſhall have com-
" mitted any capital offence in *Scotland* and *Ire-*
" *land*, or any of the Iſlands or Foreign Plantati-
" ons of the King, his heirs or ſucceſſors, where
" he or ſhe ought to be tried for ſuch offence,
" ſuch perſon or perſons may be ſent there, to re-
" ceive ſuch trial, in ſuch manner as the ſame
" might have been uſed before the paſſing of this
" Act."

See 33 Hen. 8. c. 23. But by the ſtatute of 35 Hen. 8. c. 2. it is en-
" acted, That all treaſons committed out of this
" realm of England ſhall be enquired of, heard,
" and determined before the Court of King's
" Bench, or elſe before ſuch commiſſioners, and
" in

" in ſuch ſhire of the realm, as ſhall be aſſigned " by the King's commiſſion," &c. PLATT's CASE.

To enable the priſoner to procure his diſcharge under the *Habeas Corpus Act*, he preſented his petition to THE COURT of Oyer and Terminer, and General Gaol Delivery (*a*), at the Old Bailey, on the firſt day of the February Seſſion next after his commitment; and no indictment having been preferred againſt him, nor any affidavit made that the witneſſes for the Crown could not be produced during that Seſſion, he prayed on the laſt day of the Seſſion, that he might be admitted to bail and diſcharged; but a queſtion aroſe on the form of his commitment, Whether the Court of Gaol Delivery by their general power under the commiſſion, or by their ſpecial power under the *Habeas Corpus Act*, had ſufficient authority for this purpoſe? and the queſtion was argued by Mr. *Howarth* and Mr. *Alleyn* for the priſoner, and by Mr. *Attorney General* (*b*) and Mr. *Wallace* for the Crown.

(*a*) Mr. Juſtice Gould, Mr. Juſtice Willes. Mr. Baron Perryn, Mr. Serjeant Glynn, Recorder.

(*b*) Edward Thurlowe, Eſq.

For the priſoner. Juſtices of Gaol Delivery have by the common law juriſdiction in high treaſon, by virtue of the generality of their commiſſion; the words of which include all priſoners alike without exception (*c*). This is confirmed by the ſtatute of 1 Ed. 6. c. 7. which enacts, " That in all caſes where any perſon ſhall have " been found guilty of any manner of treaſon, " and reprieved before judgment, ſubſequent " Juſtices of Gaol Delivery ſhall have power to " give judgment of death againſt ſuch perſon, as " the Juſtices before whom ſuch perſon was " found guilty might have done, if *their commiſ-* " *ſion of Gaol Delivery* had continued in force."

(*c*) In the modern commiſſions of Goal Delivery, *treaſons* are expreſsly included. *See aſt p. to 4 vol. Black. Comm.*

And

PLATT'S CASE.

And it follows, says *Lord Coke*, 4 *Inst.* 169. that by the judgment of the whole Parliament, they may now deliver the gaol of priſoners committed for this high offence. By the HABEAS CORPUS ACT alſo, they are empowered to admit to bail a priſoner committed for high treaſon, who has petitioned for his diſcharge, and who has not been indicted ſome time in the next Seſſion after his commitment. Mr. *Platt* therefore, being found in the gaol, and having complied with the forms of the Act, is entitled either to be diſcharged, upon the proclamation under the commiſſion of Gaol Delivery (*a*), or to be *bailed* by virtue of the ſtatute; for otherwiſe a perſon might be impriſoned for life, without the poſſibility of redreſs; and the Court in its exerciſe of its powers by common law, or in the conſtruction of the ſtatute, will incline to do that which is moſt favourable to the liberty of the ſubject.

(*a*) 2 Inſt. 43. 4 Bl. Com. 270.

But it may be ſaid, that this authority to admit a priſoner to *bail* under the HABEAS CORPUS ACT, or to diſcharge him at the call over, does not extend to caſes of high treaſon which are not within the juriſdiction of the Court *to try;* and that the preſent caſe, from the ſtatement in the warrant that the fact was committed at Savannah, can only be tried in the Court of King's Bench, or under a ſpecial commiſſion, by virtue of the ſtatutes 33 Hen. 8. c. 23. and 35 Hen. 8. c. 2.

As to the firſt point, ſuppoſe a perſon in the gaol of Newgate for high treaſon committed in the County of York, this Court has no juriſdiction *to try* ſuch a priſoner; and yet if his proſecutors were to neglect to remove him in due time

time by *Habeas Corpus* to the gaol of the County in which the offence was committed, and in which County alone he could be tried, the Court under ſuch circumſtances would certainly have a power to receive a petition for his diſcharge, and by admitting him to *bail* at the end of the Seſſion, would prevent the perpetual impriſonment which muſt otherwiſe reſult from his proſecutors neglect. Admitting therefore that the preſent offence can only be tried in the Court of King's Bench, or under a ſpecial commiſſion, it was the duty of the officers of the Crown to have procured ſuch trial. A more than ſufficient time has elapſed for that purpoſe, and Mr. *Platt* has given public notice that he was ready to prove his innocence. He has no mode by which he can compel the Crown to iſſue the commiſſion; and unleſs this Court will interpoſe, and force on a proſecution from the Crown, by the peril of the priſoner's diſcharge, he muſt lie in gaol until the mercy of the Crown ſhall pleaſe to releaſe him; for the Court cannot make an order to remove ſuch priſoners to the proper juriſdiction, and by that means enable them, if innocent, to procure a legal diſcharge.

But it does not appear by the warrant under which Mr. *Platt* is committed, that he is other than an ordinary priſoner in the gaol of the Court for high treaſon; for if the words of the warrant are not ſufficiently technical or certain to bring him within the ſcope of the ſtatutes of 33 Hen. 8. c. 23. and 35 Hen. 8. c. 2. the Court will not intend or preſume any thing, in order to place him within another juriſdiction. On the contrary, ſo far as intendment and preſumption can

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can go, the Court will be *aſtute*, in favour of the perſonal liberty of a man who is confined in a country far diſtant from his own, and who has exerted every endeavour on his part to procure a trial. The 33 Hen. 8. c. 23. enacts, "That any "perſon who on being examined before the "Privy Counſel ſhall be *vehemently ſuſpected* of "any treaſon, may be tried in any County, by "virtue of a ſpecial commiſſion, although ſuch "treaſon was committed in any other ſhire or "place within or *without* the King's dominions." But ſome doubts having ariſen reſpecting the trial of treaſons committed abroad, it is enacted by 35 Hen. 8. c. 2. "That all treaſons committed "*out of this realm of England* ſhall be tried either "in the Court of King's Bench, or in any Coun-"ty, by virtue of a ſpecial commiſſion." The warrant of commitment therefore, in order to bring an offender within the operation of theſe ſtatutes, ought to have alledged that the treaſon was committed at ſuch a place, *without the realm of England:* but the preſent warrant merely ſtates, "for treaſon committed at Savannah, in the "Colony of Georgia, in North America;" and it cannot be intended that this place is *without the realm of England*, unleſs that fact had been poſitively averred. If a ſpecial commiſſion had iſſued for the trial of the priſoner, it would have averred that the offence was committed *without the realm*. The indictment muſt neceſſarily have followed that deſcription; for there cannot be a doubt but that if it had only ſtated the treaſon committed at Savannah, in the Colony of Georgia, in North America, it would have been uncertain and bad; and the ſame degree of certainty

tainty is requiſite in the warrant of commitment. The ſpecial commiſſion under which *Captain Roche* was tried for a murder committed at the Cape of Good Hope, averred that he was *vehemently ſuſpected* by the Council; that the crime had been perpetrated in parts *beyond the ſeas*, at the Cape of Good Hope, *without the realm of England;* and directed the commiſſioners to try him for a murder committed *without the King's dominions*, exactly purſuing the eſſential words of the ſtatute on which the commiſſion was founded. The indictment adopted the ſame form, and followed the averments in the commiſſion; and the warrant on which he was apprehended was drawn with equal certainty. PLATT'S CASE.

In the caſe of *the King v. Sayer*, who was committed for *treaſonable practices*, the certainty required in commitments for HIGH TREASON was ably and elaborately diſcuſſed; and *Lord Mansfield* declared the warrant too general and vague, and that commitments for this offence ought to contain the greateſt certainty. Suppoſe a man committed under a warrant for *ſtealing* a variety of things, without ſaying that he *feloniouſly* ſtole them, there cannot be a doubt but ſuch a warrant would be bad from its uncertainty (*a*); and yet every body knows by the import of the word "*ſtealing*," that ſtealing is a felony.

(*a*) Sed vide infra Rex v. Judd.

Upon this ſingle ground therefore, *viz.* the uncertainty of the warrant, whatever the Court may conceive of their general power under the *Habeas Corpus Act*, the priſoner will be entitled to his diſcharge.

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For the Crown. Juſtices of Gaol Delivery have no juriſdiction *to try* the offence for which the priſoner is committed; and therefore have no power to diſcharge him by proclamation under their commiſſion, or to admit him to *bail* by virtue of the ſtatute.

Crom. Jur. 131. 4 Inſt. 168, 184. Bro. Com. 23. 2 Rich. 3. pl. 47. Co. Lit. 293. Bac. Elem. 15, 16. 1 Reeve. 57. (*a*) 4 Edw. 3. pl. 32. 6. Edw. 3. pl. 35. 23 Edw. 3. pl. 21. 15 H. 7. pl. 5. F. N. B. 240.

The commiſſion of Gaol Delivery is unqueſtionably of very high antiquity, and confers a very extenſive power; it is the next in order to the ancient commiſſion of *Eyre*, and was frequently ſent out during the intervals of the ITER; but by tracing its hiſtory from year to year, through the ſeveral caſes in the Year-Books (*a*), it will be found that limits have been fixed to the juriſdiction of its Juſtices, and that their power is not, as now contended for, co-extenſive with the walls of the priſon. They cannot diſcharge a priſoner *for debt*, committed by legal authority, on the ground that his commitment is informal; and their criminal juriſdiction is confined merely to that claſs of priſoners who lie in gaol for their *deliverance*, and does not extend to ſuch priſoners as are *attached* by any other competent judicial authority. Their authority to act upon the caſes of the ſeveral priſoners, is merely incidental to their power of delivering the gaol of ſuch priſoners as are within their juriſdiction. Previous to the ſtatute of 4 Edw. 3. c. 2. they could not proceed upon an indictment taken before Juſtices of the Peace. *Year-Book*, 15 *Hen.* 8. *pl.* 5. And even by force of the 1 Edw. 6. c. 7. from which they derive all their preſent authority over the crime of high treaſon, they cannot allow a pardon to a man *condemned* under a former commiſſion of Gaol Delivery. *Daliſon*, 20. (*a*). An attentive peruſal of this ſtatute will prove that the whole ſcope and purpoſe

Cro. Eliz. 90, 179. Ander. 111. (*a*) 7 Co. 31. 12 Co. 33.

purpoſe of it was merely to bring into the Gaol Delivery priſoners *in franchice*, ſo that every offender within the county might derive the benefit of deliverance; and therefore it inflicts a penalty upon all ſheriffs, lords of franchice, and keepers of gaols within the county, who ſhall neglect to bring in criminals in due time; which evinces that it was not in contemplation of the legiſlature, that any other but thoſe who could be tried before the Juſtices of Gaol Delivery ſhould be brought in. The whole extent and compaſs of their authority is, that they may proceed upon an indictment againſt a priſoner who is in gaol upon his deliverance; and that if no proſecution is inſtituted againſt ſuch a priſoner, during the continuance of the commiſſion, they may diſcharge him after inqueſt by proclamation; that is, if no indictment has been preferred againſt him before the Grand Jury, or, being preferred, is returned *Ignoramus*. From theſe obſervations it appears, that the Juſtices of Gaol Delivery cannot *diſcharge* priſoners whoſe offences they have not power to try; and previous to the ſtatute of 1 Edw. 6. c. 7. they had no juriſdiction to try high treaſon; therefore, ſays *Sir William Staundford*, they could not deliver the gaol of priſoners committed for this offence; and it is the uniform opinion of *Crompton*, *Coke*, *Hale*, and *Hawkins*, that they have derived this power entirely from the authority which that ſtatute gives them to hear and determine on the crime. PLATT'S CASE.

But it is contended in favour of the priſoner, that the Court may *deliver* the gaol of priſoners whom they have no power *to try*; and that from a defect of certainty in the preſent warrant of

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commitment, Mr. *Platt* is to be conſidered as a priſoner within the ſcope of their ordinary power and juriſdiction.

As to the firſt point, a caſe has been ſuppoſed, of a man committed to Newgate for high treaſon in the County of York, and not removed by *Habeas Corpus* to his proper juriſdiction. In ſuch a caſe, the Court may deliver the gaol of its priſoners, but they cannot either diſcharge or bail him. This is done by a mere warrant, without iſſuing a *Habeas Corpus*, commanding the gaoler in whoſe cuſtody he is confined to deliver him, and the gaoler of the place where the offence is committed to receive him, in order that he may be ſubject to his proper tribunal for trial. Inſtances have occurred, where men have been committed to priſon in *England* for felonies done in *Ireland;* yet the Juſtices never conceived them to be objects for their deliverance; but upon certificate of an indictment found within the proper juriſdiction, they have been removed by an order from the Secretary of State, under that power which is recognized by the *Habeas Corpus Act*. Not long ago there was a caſe of murder at *Barbadoes*, and of a *felonious* marriage in *Ireland*, where the parties were committed to Newgate; and it never entered into the imagination of thoſe great men who appeared in favour of the priſoners, that they could be diſcharged by proclamation on the laſt day of the Seſſion. The proclamation is nothing more than calling upon the proſecutor to charge ſuch priſoners as ſtand upon their deliverance with a crime; and it would be abſurd to call upon the officers of the Crown *here*, on the laſt day of a Seſſion,

1 Shower, 190. Lucas, 429.

Seſſion, to proſecute a priſoner for murder, or other felony, *in Ireland*. The Court therefore, finding ſuch a priſoner in gaol, attached for a crime which they have no juriſdiction to try, muſt neceſſarily detain him, that he may be delivered over to another cuſtody for trial; and it will not follow, as ſuggeſted on the other ſide, that a man muſt remain impriſoned for life, becauſe all juriſdictions are not confounded, and every inferior Court, nay even a Juſtice of the Peace, permitted to allow bail in caſes of high treaſon; for to that concluſion the arguments in favour of the priſoner extend. It is truly ſaid, however, that in the preſent caſe, the Court cannot make an order to remove Mr. *Platt* to another juriſdiction, and as they cannot deliver the gaol of him by that means, he ought to be delivered by proclamation; but the argument drawn from theſe premiſes is falſe and inconcluſive. The priſoner by the 38 Hen. 8. c. 2. may be tried either in the Court of King's Bench, or under a ſpecial commiſſion. The gaol of Newgate, and every other gaol in the kingdom, is conſidered as a gaol within the general juriſdiction of the King's Bench. Mr. *Platt* therefore is at preſent in the proper cuſtody of that Court in which an indictment againſt him may be preferred, and which undoubtedly has juriſdiction to try his offence: and an order in ſuch a caſe would be vain, idle, and inſignificant. PLATT'S CASE.

But it is contended, that if the priſoner cannot be *diſcharged* under the proclamation of Gaol Delivery, yet having complied with the forms of the *Habeas Corpus Act*, he may be admitted to *bail* by virtue of that ſtatute. It has been ſhewn already, however, that the power of this Court, under

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under this Act, cannot extend to priſoners whom they have not juriſdiction to try; and a variety of caſes are to be found in the books which prove this poſition. But even admitting for a moment that the Court poſſeſſed concurrent juriſdiction in this caſe, with the Court of King's Bench, they would ſurely exerciſe it with ſimilar diſcretion. Suppoſe then that Mr. *Platt* had obtained a *Habeas Corpus* to the King's Bench to be bailed, would that Court admit him to bail under the circumſtances of this caſe? The return would inform the Court, that he had lain in gaol one term; that he had made no application to *that* Court; that the proſecutor had not preferred any indictment againſt him; that he was in cuſtody, in the gaol of the Court, on a charge of high treaſon, committed in the province of Georgia during the exiſtence of a rebellion there, in the courſe of which rebellion he was committed for the crime. It is not aſſuming too much to ſay, that, in ſuch a caſe, the wiſdom of the Court would not think itſelf called upon to effect his diſcharge. Sir *William Wyndham* was apprehended during the rebellion which then exiſted. In Trinity Term 2 Geo. 1. he applied to the King's Bench to be bailed, and the Court, upon the ſingle ground that he had been apprehended for high treaſon *bello flagrante*, immediately remanded him, and he was not bailed until the rebellion had ſubſided, and four Terms had elapſed from the period of his commitment. This caſe abundantly proves that the Court, if they poſſeſſed the power, are not obliged to diſcharge the priſoner *ex neceſſitate*, or to admit him to bail without reference to any kind of diſcretion; but it is the clear and eſtabliſhed law of the realm, that the

Court

Court of King's Bench alone can bail in cases of high treason. PLATT'S CASE.

As to the defect of certainty in the warrant of commitment, the whole of the observations that have been made amount to this: That an indictment for this offence must charge it to have been committed *without the realm*, and the precedent of *Captain Roche's* commission and indictment was quoted to support it; but no kind of learning upon the form of *warrants*, nor any one decided case upon the subject of *warrants*, has been produced to the Court. Much less strictness is required in a *warrant* than in an *indictment;* and it is not easy to conceive, whatever may have been the practice, that the averment contended for is indispensably necessary in an indictment for this crime; for the statutes of Henry the Eighth make the question of the *venue* immaterial, otherwise than as a matter of mere formality. But if this argument was well founded, it would not avail the prisoner; for there is no analogy between the form of *indictments* and the form of *warrants;* and Courts have in their decisions always gone upon the fair, direct, and substantial intendment of the warrant, and not upon mere technical expressions. But suppose, the averment *without the realm* to be necessary, the prisoner could not in that case be tried before this Court; and the only consequence would be, that he must be sent over to the place where the crime was committed *(a)*.

(*a*) Comburley's case, Strange, 848.

The *Court*. A warrant of commitment must contain *convenient certainty;* and therefore it is not necessary to alledge that the charge was made upon

1 Salk. 347. 3 Vin. Ab. 515. 2 Inst. 52. Palm. 558. 10 Mod. 334. 1 Hale, 582. 2 Hawk. 186.

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upon oath, for a commitment may be *ſuper viſum*, and then an oath is unneceſſary. This doctrine is completely eſtabliſhed in the caſe of *Kendal v. Roe*, 5 *Mod.* 58. *Sir William Wyndham's caſe*, 1 *Strange*, 2. *Mr. Wilkes's caſe*, 2 *Wilſ.* 158. 11 *State Trials*, 304. *and Curtis's caſe*, *Foſter*, 136. The charge in the preſent commitment is upon oath; ſo far, it is more explicit and full than the law requires: it further alledges, that the priſoner was charged with high treaſon at *Savannah*, in the Colony of *Georgia*, in *North-America*. The common underſtanding of every man is informed, that this *North-America* is part of the four diviſions of the world, and that it is without the four ſeas of Great Britain: The Court therefore cannot intend, againſt common ſenſe, common language, and grammar, that there may be a place ſituate *in England*, known by the deſcription of "*Savannah*, in the Colony of *Geor-*"*gia*, in *North America*." Even if it were an indictment, in which a greater ſtrictneſs is required, ſuch an intendment could not be ſupported by any known rules of artificial reaſoning.—This warrant therefore contains *ſufficient certainty* to ſhew that the high treaſon which it charges the priſoner with having committed, was in fact committed *out of the realm of England*. It was the antient opinion, that the ſpecies of treaſon, which conſiſts, by 25 Edw. 3. c. 2. in *adhering to the King's enemies*, might be tried before the ſtatute 35 Hen. 8. c. 2. within the kingdom by the rules of the common law, though the *aid and comfort* was afforded *without the realm;* but that every other ſpecies of treaſon committed out of the realm, muſt be tried in the place where it was committed, or under the proviſions of that Act of Parliament. Perhaps therefore in every other

other ſpecies of treaſon, except that firſt mentioned, it would be neceſſary, both in the ſpecial commiſſion and in the indictment, to purſue the language of the Act, and to aver that it was committed *without the realm;* but, without giving an opinion upon this point, it is not neceſſary to uſe ſuch an averment in the warrant of commitment. PLATT'S CASE.

As to the queſtion. Whether Juſtices of Gaol Delivery can admit a priſoner to bail for high-treaſon, independent of the *Habeas Corpus* Act, it is very clear that the Court of King's Bench alone poſſeſſes ſuch a power (*a*); and as the King's Attorney General oppoſes the diſcharge of this priſoner, it is unneceſſary to conſider whether the Court could have diſcharged him under the proclamation, upon a ſuppoſed aſſent of the Crown, if the matter had paſſed *ſub ſilentio.* (*a*) 2 Hale, 129. 8 Mod. 96.

The *Habeas Corpus* Act unqueſtionably authorizes Juſtices of Oyer and Terminer and General Gaol Delivery to admit priſoners to bail for high treaſon, on their complying with the forms mentioned in the Act; and being made to protect the liberty of the ſubject, it ought always to receive ſuch a conſtruction as appears moſt conducive to that end: but the queſtion in the preſent caſe is, Whether the ſpecies of high treaſon for which Mr. *Platt* is in cuſtody, is within the cognizance and power of that Court?

The commiſſion under which the preſent Court of Gaol Delivery acts, is a general commiſſion of Gaol Delivery for all offences, in a common and ordinary way, committed *in the county of Middleſex.* The high treaſon for which the priſoner is in Vaugh. 140.

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in cuſtody, ſufficiently appears on the face of the warrant to have been committed *out of the realm.* The ſtatute of 35 Hen. 8. c. 2. ſays, that all treaſons committed *out of the realm* ſhall be tried either before the Court of King's Bench, or under a ſpecial commiſſion; and it is in the option of the Crown to ſelect which of theſe judicatures it pleaſes for the trial of the priſoner. The petition therefore to a Court of Gaol Delivery who have no power at all to try the priſoner, is nugatory and void. In the caſe of *the King v. Yates (a)*, who was committed for high treaſon to the priſon at *Hull*, an application was made to the King's Bench in the firſt week of the enſuing Term, purſuant to the direction of the *Habeas Corpus* Act, and by HOLT *Chief Juſtice.* "The "words of the Act are certainly in the *disjunc-* "*tive*, that the priſoner may petition the King's "Bench, *or* the Gaol Delivery; but it muſt be "taken *reſpectively*, otherwiſe the felons in all the "gaols in England muſt be diſcharged; for if "they are committed juſt after the Aſſizes, and "come hither, they muſt be *bailed;* if they are "not indicted before the end of the firſt term, "and if not tried before the end of the ſecond "term, muſt be *diſcharged;* and yet they cannot "be indicted but in the county where the offence "was committed, which can never be thought "the intent of the Act." This caſe proves that the application ought to be made to that Court only which has juriſdiction to try the offence. Suppoſe even that no Act of Parliament had pointed out the proper juriſdiction for the trial of this offence, all that the Court could have done in ſuch a caſe would have been to enquire by what method the priſoner could have been ſent over to Georgia, in order to receive a legal trial, but he could

(a) Show. 190. B. R. Hill. 2 Will. and Mary.

Comb. 6. 4 Inſt. 71. 1 Mod. 97. Stiles, 418. Lutw. 12. Salk. 103.

could not have intitled himſelf under the *Habeas Corpus* Act to be diſcharged. Captain *Roche*, under ſimilar circumſtances, petitioned this Court, in July Seſſion, to be diſcharged under the *Habeas Corpus* Act; but the Court did not allow his prayer; and he was continued in gaol, although he was not tried till the *December* Seſſion following, and although the *September* Seſſion had intervened. Pirates are frequently committed to Newgate, to be tried by the Admiralty Seſſion, and no notice is ever taken of ſuch priſoners at the Gaol Delivery, nor any enquiry made when a Commiſſion of Admiralty is to iſſue. In the preſent caſe it does not depend on the will of the Crown, whether a ſpecial commiſſion ſhall iſſue or not; for the priſoner may apply, under the *Habeas Corpus* Act, to the Court of King's-Bench, to be tried or bailed; and if not tried in two terms after his prayer is received, he will be intitled to his diſcharge; but this Court cannot interpoſe. PLATT'S CASE.

Mr. *Serjeant Glynn, Recorder.* I concur in opinion with the learned Judges, that this Court cannot upon the preſent occaſion releaſe Mr. *Platt;* but I do not accede to the poſition, that the power of Juſtices of Gaol Delivery extends only to the caſes they are competent to try. Common experience proves, and neceſſity requires that their power ſhould extend to all priſoners committed for crimes. It is true, they have not a power, like a Court of Error, over ſummary convictions; but if priſoners are committed to take their trial in other counties, and before other juriſdictions, Juſtices of Gaol Delivery are to take notice, that it is a legal detention for a legal purpoſe. Suppoſe a priſoner in cuſtody under a com-

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a commitment ſo abſurd, informal, and ſubſtantially defective, that it does not amount to any charge importing that he is within the juriſdiction of the Court, or that he is to be removed to any other juriſdiction to be tried; ſuch a priſoner would ſurely be intitled to his deliverance under the proclamation. A caſe of this kind occurred within my own practice, where a man was charged with divers offences in divers counties, in ſuch a manner that it was impoſſible to determine how or where he was to be tried, and at the end of the Seſſion I ordered him to be diſcharged. A priſoner charged with an offence triable under a ſpecial commiſſion, muſt remain a convenient time in gaol, for the purpoſe of ſuch trial, and the Court will examine whether he is legally detained for that purpoſe; but I conceive, that if he is detained beyond a legal time, and no care taken or expedition uſed to bring him to trial, the liberty of the ſubject requires that the Court ſhould interpoſe, and effect his diſcharge.

The priſoner was remanded.

Martin's

Martin's Caſe.

CASE 79.

Pulling wool from the body of live ſheep and lambs *animo furandi*, is felony.

AT the Lent Aſſizes for Northampton in the year 1777, *Robert Martin* was indicted for ſtealing twenty pounds weight of wool, the property of *James Capps*.

It appeared upon the evidence, that the priſoner had pulled the wool from the bodies of ſixteen lambs and lamboxes, *viz.* lambs of a year old, whilſt they were living; and in ſome places had torn the ſkin away with it.

The property being taken from the bodies of living animals, a doubt aroſe whether it was the ſubject of larceny; and the queſtion was referred to the conſideration of the Judges.

The Judges were unanimouſly of opinion, That it was larceny; and the principle they went upon was, that where larceny may be committed of the thing itſelf, it may alſo be committed of the produce of that thing. Therefore, *aliter & è converſo*, it is no larceny at common law to gather and carry away the fruit from a tree which is growing, becauſe from its adherence to the freehold it is not larceny to ſteal the tree itſelf. But it has been lately determined, upon a caſe reſerved by Mr. Juſtice *Bathurſt*, that larceny may be committed by taking the milk from a cow, becauſe it would be larceny to ſteal the cow itſelf. This diſtinction is agreed to by moſt of the ancient writers upon Crown Law. *Dalton*, 21. *Crompton*, 36. But to prevent the thoughtleſs

MARTIN'S CASE.

leſs and wanton frolicks which might be played with theſe trifling kinds of property from being proſecuted as petty larcenies, when perhaps they were unmixed with any fraudulent or felonious deſign, the law, proceeding upon the idea *de minimis*, requires the property ſtolen to be of the value of *twelve pence*. The queſtion therefore, whether felony or not, muſt depend on the circumſtances denoting the intention; as the quantity of property taken, or the behaviour of the party at the time; and if a wicked diſpoſition is diſcovered, *une diſpoſition a faire un male choze*, as it is deſcribed by *Britton*, it may be evidence of felony, notwithſtanding the trifling quality of the thing taken.

CASE 80.

Edward Tuft's Caſe.

To indorſe a bill in a *fictitious name* is forgery, although the money might have been as well obtained by indorſing it in the *real name* of the perſon who uttered it.

AT the Lent Aſſizes for the county of Leiceſter 1777, *Edward Tuft* was tried before Mr. Juſtice *Nares*, for forging an indorſement on a bill of exchange. The Jury found the priſoner *Guilty;* but the learned and humane Judge, cautious of paſſing ſentence of death in a caſe which admitted of doubt, ſubmitted to the conſideration of the TWELVE JUDGES, Whether, upon the following ſtate of facts, the conviction was proper?

The bill of exchange was the property of one *William Whethera!*, out of whoſe pocket it had been picked or loſt, with other things, at Leiceſter races. The priſoner had the very ſame night endeavoured to negociate it at Leiceſter; but being diſappointed, he proceeded to Market Harborough,

TUFT'S CASE.

borough, where he bought a horſe of one *John Ingram*, the landlord of the inn, and offered him this bill to change. The landlord not having caſh ſufficient in the houſe, carried it to a banker's in the town, where the clerk told him that it was very good paper, for that he knew the payee who had indorſed it, and that if he (the landlord) would put his name on the back of it, it ſhould be immediately diſcounted. The landlord however, not knowing the perſon from whom he had received it, refuſed to indorſe it; but told the clerk, that the gentleman was then at his houſe, and he would go and fetch him: acccordingly he went to the priſoner, who accompanied him to the banker's. The clerk then told the priſoner, that it was the rule of their ſhop never to take a diſcount bill unleſs the perſon offering ſuch bill indorſed it; and therefore if he (the priſoner) would indorſe it, it ſhould be diſcounted. The priſoner immediately indorſed it by the name of "*John Williams*," which was not his own name, and the banker's clerk, after deducting the diſcount, gave him the caſh for it. The priſoner, in his defence, ſaid he had found it.

The Judges were unanimouſly of opinion, That this was a forgery; for although the fictitious ſignature was not neceſſary to his obtaining the money, and his intent in writing a falſe name was probably only done to conceal the hands through which the bill had paſſed, yet it was a fraud both on the owner of the bill, and on the perſon who diſcounted it. The one loſt the chance of tracing his property, and the other loſt the benefit of a real indorſer, if, by accident, the prior indorſements ſhould have failed.

See the caſe of *Hyan Levy*, who was convicted upon the authority of this caſe, at the Old Bailey in October, Seſſion 1782.

Joſeph

CASE 81.

Joſeph Jones's Caſe.

On an indictment againſt an apprentice forinliſting himſelf as a ſoldier, the indentures muſt be proved by the ſubſcribing witneſſes.

AT the Lent Aſſizes 1777, for the City of Coventry, *Joſeph Jones* was tried before Mr. Juſtice *Nares* for a miſdemeanor; for that he, being an apprentice, bound by INDENTURE to ſerve one *William Lucas*, jobbing-Smith, for the remainder of a term of ſeven years, and fraudulently deviſing to obtain money from the Paymaſter of the 7th Regiment of Foot, did cauſe himſelf to be inliſted, without the conſent of his maſter, as a foot ſoldier in the ſaid Regiment, and did unlawfully and deceitfully receive from the Paymaſter the ſum of 3l. 8s. he the ſaid *Joſeph Jones* well knowing, *&c.* that he was diſqualified from ſerving, *&c.*

To prove that he was diſqualified, the maſter produced the indentures of apprenticeſhip, and claimed his apprentice. There were two ſubſcribing witneſſes to the execution of the indenture, but neither of them were produced; and the execution of it was proved by other teſtimony.

The priſoner was convicted; but the caſe was reſerved for the opinion of the TWELVE JUDGES, on a queſtion, Whether, as the actual and legal binding was the fact which conſtituted the *git* of the offence, the indenture ſhould not have been proved by the ſubſcribing witneſſes? And they were unanimouſly of opinion, That the indenture ought to have been ſo proved, and that the conviction was bad.

Elliot's

Elliot's Caſe.

CASE 82.

A forged bank note, although the word "*Pounds*" is omitted in the body of it, and there is no *water-mark* in the paper, is a *counterfeit* note for the payment of money.

JAMES ELLIOT was indicted at Maidſtone Aſſizes, on 21ſt July 1777, for forging a BANK NOTE, with the name of *Thomas Thompſon* thereunto ſubſcribed, purporting to bear date the 20th of June, 1775, and to have been ſigned by one *Thomas Thompſon*, for the Governor and Company of the Bank of England, for the payment of the ſum of FIFTY POUNDS to Mr. *Joſeph Crooke*, or bearer, on demand; the tenor of which ſaid Note is as followeth, *that is to ſay*,

"N° 17. 73.—I PROMISE to pay to Mr. *Jo-*
"*ſeph Crooke*, or bearer, on demand, the ſum of
"FIFTY

"£. FIFTY. LONDON, *the 20th day of June*, 1775.

"For Govr. and Comp^y. of
"ENT^D. *C. Blewert.* "the Bank of England,
"THO. THOMPSON."

The ſecond count charged it to be "a certain "note in *the form* of a bank-note." The third count charged it to be "a certain promiſſory "note for the payment of money." There were alſo other counts, in which the offence was charged to have been committed with an intention to defraud the Governor and Company of the Bank of England.

This indictment was admitted to be framed on the 31 Geo. 2. c. 22. which extends the ſubjects of forgery enumerated in the 2 Geo. 2. c. 25. to all corporations.

ELLIOT'S CASE. It appeared in evidence, that the priſoner had applied, under the fictitious name of *Pearce*, to one *Mary Smith*, who uſually made the moulds for the Bank of England paper, to make him a pair of ſmall moulds, finer than thoſe which ſhe made for the uſe of the Bank; but ſhe refuſed to execute his order. That about two months previous to finding the indictment, the priſoner delivered to a Mr. *Robert Ryland*, a copper-plate printer, two copper-plates and a quantity of fine paper, deſiring that he would ſtrike off two dozen impreſſions from each plate, the one of which was engraved for the ſum of Twenty Pounds, the other for the ſum of FIFTY POUNDS, both of them payable by the Govr. and Compy. of the Bank of England. Mr. *Ryland* ſtruck off the impreſſions, purſuant to the order, and re-delivered them, with the plates, to the priſoner. When the priſoner was apprehended, impreſſions of the above deſcription were found upon him, and produced in Court, together with the copper-plates, which had been found in conſequence of information derived from him. Among the printed impreſſions found upon the perſon of the priſoner was the forged inſtrument ſtated in the indictment. The plate from which it had been ſtruck off was identified by Mr. *Ryland*; and the Officers of the Bank proved, that it was in every reſpect ſimilar to a bank-note, except, *firſt*, that the number was not filled up: *ſecondly*, that the word POUNDS was omitted in the body of the note: *thirdly*, that the texture of the paper was rather thicker than that uſed by the Bank: and *fourthly*, that in the fabric of it the water-mark, *viz.* the words BANK OF ENGLAND were not inſerted: but they ſaid, that a bank-note, with the like omiſſion of the word POUNDS in the body

dy of it, being regular in other reſpects, would be paid by the uſage of the Bank, after it had paſſed the Examiner's Office. A real bank-note of the ſame date and tenor, except as above excepted, was produced in evidence. ELLIOT'S CASE.

Mr. *Morgan*, the priſoner's Counſel, contended, *Firſt*, That the word POUNDS being omitted in the body of the note, it was not a note for the payment of *money;* or if it was for the payment of money, it was totally uncertain what coin, whether pounds or ſhillings, and that upon ſuch an uncertainty in a declaration the plaintiff would be nonſuited.

To this objection it was anſwered, That the tenor of the note imported a promiſe to pay *ſome money* by a Company whoſe peculiar traffic is in caſh, and whether for pounds or ſhillings would make no difference in the offence.

Secondly, That this was no forgery upon the corporation of the Bank of England, becauſe the water-mark was omitted in the note, which was eſſential to the notes of the Company; and therefore it bore no reſemblance to their notes, and could not be a fraud upon them.

To this it was anſwered, That whatever weight this objection might have upon the count for forging a bank-note, it had none upon the count charging it to be a note for the payment of money. It was clearly to be paid by that corporation, and a fraud upon them. A counterfeit need not be a critical counterpart. If made *mala fide* ſo ſimilar as to have an aptneſs to impoſe, it is ſufficient. The water-mark is not of the eſſence

ELLIOT'S CASE.

of a bank-note, ſince the Company are not obliged by any law to uſe it. They may drop it or uſe it as they ſee occaſion. It is ſufficient that the tenor of the note imports a promiſe from the corporation of the Bank to pay. The caſe of a forgery by one *Vaughan*, tried at O. B. in 1768, was cited, in which moſt of the letters of the water-mark were omitted in the ſubſtance of the paper; but as no authentic or accurate ſtate of the caſe was produced, no ſtreſs was laid upon it.

The learned Judge left it with the Jury to conſider whether the word FIFTY imported POUNDS; and the Jury found the priſoner *Guilty* upon the count which charged him with forging "a cer- "tain promiſſory note for the *payment of money*, "with intention to defraud the Bank of Eng- "land," and acquitted him of the reſt of the indictment.

Mr. *Morgan*, the priſoner's Counſel, moved the following objections in arreſt of judgment.

Firſt, It is charged in the count upon which the priſoner is found *guilty*, to be a note for the payment of *money*; but in reciting the tenor of it appears to be for the payment of FIFTY, and does not ſay POUNDS. The recital therefore materially varies from the charge, by leaving out a deſcription of the coin, whether pounds or ſhillings, for which the note purports to be drawn, and no other coin can be conſidered as *money*.

Secondly, That it cannot be with an intention to defraud the Governor and Company of the Bank of England. The 31 Geo. 2. c. 2. ſ. 78. whereon the count upon which he is convicted is grounded,

grounded, relates, and the other ſtatutes relate to notes for the payment of money; but the tenor of the note ſet forth is not for the payment of money, and therefore not within them. The note produced in evidence appears intended to reſemble a bank-note; but all bank-notes have the words BANK OF ENGLAND viſible in the ſubſtance of the paper, and the count charges the intention to defraud the Bank. There is not the leaſt appearance of the words BANK OF ENGLAND in the ſubſtance of the note, and therefore does not reſemble the notes of that corporation. ELLIOT'S CASE.

In Mich. Term 18 Geo. 3. the JUDGES, at Serjeants or Symond's Inn, were unanimouſly of opinion, That the verdict was legal.

Harriſon's Caſe.

CASE 83.

AT the Old Bailey, in September Seſſion 1777, *John Harriſon* was convicted before Mr. Juſtice *Blackſtone*, on the ſtatutes 2 Geo. 2. c. 25. and 31 Geo. 2. c. 22. ſ. 78. for forging a certain *receipt for money*, with intention to defraud the corporation called "*The London Aſſurance.*" To alter an entry of money received, made by a Caſhier of the Bank, in a BANK BOOK, by prefixing a figure to increaſe the amount, is forging a receipt.

The priſoner was Accountant to the London Aſſurance, who kept their caſh at the Bank of England. They had paid in a ſum of 210l. which

HARRISON'S CASE.

which was entered by *Clifford*, a Caſhier of the Bank, in their bank-book, in this manner:

"1777 *June*, 16 *Bank Notes.*—*Clifford.*—210."

The priſoner altered this entry by placing the figure 3 before the figure 210, which made the entry,

"1777 *June*, 16 *Bank Notes.*—*Clifford.*—3210l."

It was referred to the conſideration of the TWELVE JUDGES, Whether this was "*a receipt*," within the meaning of the ſtatute on which the indictment was founded? And they were unanimouſly of opinion, That it was "*a receipt* for "money," and that the conviction was proper.

CASE 84.

Lyon Lyons' Caſe.

A houſe under repair, but not inhabited, is not the dwelling-houſe of the owner, tho' part of his property is depoſited in it.

AT the Old Bailey, in January Seſſion 1778, *Lyon Lyons* and *Thomas Miller* were tried before Mr. Serjeant *Glynn*, RECORDER, for burglarioufly breaking and entering the dwelling-houſe of *Edward Smith*, with intention to commit a felony.

The Jury found a general verdict *Guilty*; ſubject to the opinion of the JUDGES, upon the following Caſe.

Mr. *Smith* had ſome time before purchaſed this houſe with an intention of reſiding in it, and had ſome effects therein, to the value of about ten pounds; but at the time the offence was ſuppoſed to have been committed, it was under the care of

of a carpenter, for the purpoſe of being repaired; and Mr. *Smith* had not himſelf entered into poſſeſſion of any part of it, nor did any part of his or any other family ſleep there. The priſoners broke and entered this houſe in the night-time, with an intention to ſteal; but whether it can in conſtruction of law be conſidered the dwelling-houſe of *Edward Smith*, they ſubmitted, &c. LYONS' CASE.

This Caſe was made upon the objection of Mr. *Howarth*, the priſoner's Counſel; and a copy of it was delivered to each of the JUDGES named in the margin (*a*).

(*a*) Lord Mansfield, L. C. J. De Grey, L. C. B. Skinner, Mr. J. Blackſtone, Mr. J. Aſhhurſt, Mr. J. Nares, Mr. J. Gould, Mr. J. Willes, Mr. B. Perryn, Mr. B. Hotham, Mr. B. Eyre.

The Judges were of opinion, That a houſe ſo ſituated could not be conſidered as a dwelling-houſe, it being completely uninhabited, and therefore there could be no burglary.

The judgment againſt the priſoners was accordingly arreſted (*b*.)

(*b*) In December, Seſſion 1782, *William Fuller* was indicted at the Old Bailey before Mr. RECORDER, for a burglary in the dwelling-houſe of *Henry Holland*.—The houſe was new built, and finiſhed in every reſpect except the painting, glazing, and the flooring of one garret: a workman who was *conſtantly* employed by Mr. *Holland*, who was a builder, ſlept in it for the purpoſes of protection; but no part of Mr. *Holland's* domeſtic family had yet taken poſſeſſion of the houſe; and THE COURT, upon the authority of *Lyons' Caſe*, held that it was not the *dwelling-houſe* of the proſecutor.

Tickner's

CASE 85.

Tickner's Caſe.

On an indictment of *Mayhem* on 22 and 23 Car. 2. c. 1. the malice, and *lying in wait*, may be collected from the circumſtances, and need not be expreſsly proved.

AT the Old Bailey, in February Seſſion 1778, *Thomas Tickner* and *Thomas Adams* were indicted on the ſtatute 22 and 23 Car. 2. c. 1. commonly called the *Coventry Act*; *Thomas Tickner*, for making an aſſault on *William Jacob* with a bill-hook, and ſlitting his noſe, with intention in ſo doing to maim and diſfigure the ſaid *William*; and *Thomas Adams*, for being preſent, aiding and abetting in the ſaid felony.

See Coke and Woodburn's Caſe, 6 St. Tr. 212.

The proſecutor was ſervant to a Mr. *Cole*, of Twickenham, within about a quarter of a mile of whoſe houſe the priſoner lived. About twelve o'clock at night, on the 16th January, 1778, the proſecutor diſcovered the priſoners in a field belonging to his maſter, where *Tickner* was pulling up turnips. The proſecutor went up to *Tickner*, and ſpoke to him; but inſtead of making any reply, *Tickner* immediately ſtruck him on the noſe with a ſharp inſtrument fixed into a ſtick of wood, and hanging looſe, ſomething like a flail. The blow knocked him to the ground, and he received ſeveral blows after he was down, which rendered him ſenſeleſs for ſome time. He was carried to St. George's Hoſpital, and upon examination a ſmall ſuperficial wound was found upon the right ſide of his noſe; a very large wound upon his neck, immediately under the lower jaw; a cut upon his hand; a ſmall one in the right brow; and eight wounds on the top of his head. The cut upon the noſe had divided the *exteguments* of the noſe in an oblique direction; but did not go through the bones of the noſe.

See Cro. Cir. Aſſ. p. 219. Lee's Caſe, ante, p. 55.

noſe. There is very little but ſkin covers the bones of the noſe, and it went to the bone, but did not penetrate into the noſtril. It was rather a cut or ſcratch than a ſlit; but it was ſufficient to leave a mark viſible for a long time. TICKNER'S CASE.

The evidence did not ſufficiently affect the priſoner *Adams* to put him upon his defence; but Mr. Juſtice *Gould* (preſent Mr. Juſtice *Aſhhurſt*, and Mr. Baron *Perryn*) told the Jury, that he thought the evidence againſt *Thomas Tickner*, if they believed it to be true, ſufficient in law to convict him of the charge in the indictment; for that he conceived it was not neceſſary that either the malice aforethought, or the lying in wait ſhould be expreſsly proved to be on purpoſe to maim or disfigure. The priſoner was engaged in a criminal matter (*a*); he was prepared with a weapon to defend himſelf againſt any oppoſer, and to ſupport himſelf in his unlawful deſign of ſtealing the turnips, and therefore was anſwerable for the conſequences which happened in the proſecution of his felonious intent. As to the ſlitting of the noſe, it had been adjudged in the caſe of one *Kirby* (*b*), that a ſeparating of the fleſh was ſufficient to bring the offender within the meaning of the Act of Parliament, and that in the preſent caſe the cut had reached the bone.

(*a*) See 13 Geo. 3. c. 32. by which ſtealing turnips is made a *miſdemeanour*.

(*b*) This is Barney Carroll's Caſe, ante.

The Jury found the priſoner Guilty; but on his receiving judgment, Mr. Serjeant *Glynn*, RECORDER, ordered the execution of the ſentence to be reſpited, until the opinion of the TWELVE JUDGES could be procured, Whether this conviction was proper within the meaning of the ſtatute? the words of which are, "That if any perſon ſhall "on purpoſe, and of malice aforethought and

"by

TICKNER'S CASE.

" by lying in wait, unlawfully cut out or diſable " the tongue, put out an eye, *ſlit the noſe*, cut " off a noſe or lip, or cut off or diſable any limb " or member, of any ſubject of his Majeſty, with " intention in ſo doing to maim or diſfigure, in " any the matters above-mentioned, ſuch his " Majeſty's ſubject; the perſon ſo offending, " his counſellors, aiders, and abettors, knowing " of and privy to the offence as aforeſaid, ſhall " be felons, and ſuffer death without the benefit " of clergy."

The Judges were of opinion, That the conviction was right (*a*).

(*a*) In April Seſſion 1783, *John Mills*, was tried upon this ſtatute before LORD CHIEF BARON EYRE, for maiming on purpoſe, and of malice aforethought, and by lying in wait, one *Thomas Braſier*.

The Court ſaid, a perſon who intends to do this kind of miſchief to another, and by *deliberately watching an opportunity*, carries that intention into execution, may be ſaid to *lie in wait on purpoſe*. It is not neceſſary that a man ſhould plant himſelf in any particular concealment, and effect the miſchief by ruſhing from his lurking-place, to bring the offence within the meaning of the ſtatute. If having formed an intention to maim, he comes unawares behind the perſon he intends to maim, and takes a convenient opportunity of deliberately doing the injury, it is a *lying in wait*, although he does not take any particular length of time, or appear to uſe any extraordinary degree of preparation to perpetrate the miſchief.

Rowland

Rowland Ridgelay's Caſe.

CASE 86

THIS was a caſe upon the 8 and 9 Will. 3. c. 26. drawn up and reſerved by Mr. Baron *Hotham*, at the Old Bailey, in December Seſſion 1778, for the conſideration of the TWELVE JUDGES.

What ſhall be conſidered *a puncheon* within the meaning of 8 & 9 Will. 3. c. 26.

The indictment *firſt* counted, That the priſoner not being a perſon employed in or for the Mint, &c. knowingly, felonioufly, and traitorouſly had in his cuſtody and poſſeſſion one PUNCHEON, made of iron and ſteel, in and upon which was *made and impreſſed* the figure, reſemblance, and ſimilitude of the head ſide of A SHILLING, without any lawful authority or ſufficient excuſe for that purpoſe, againſt the duty of his allegiance, &c.

The *third* count was the ſame as the firſt, for having in his poſſeſſion a puncheon, in and upon which was impreſſed the figure, reſemblance, and ſimilitude of the head ſide of A GUINEA.

The *ſecond* and *fourth* counts reſpectively charged, that the ſaid puncheon would *impreſs and make* the figure, reſemblance, and ſimilitude of the head ſide of *a ſhilling*, and *a guinea*.

The words of the Act of Parliament, as far as they relate to this queſtion, are, " that whoſoever " ſhall knowingly make or mend, or begin, or " proceed to make or mend, or aſſiſt in the " making or mending of any puncheon, coun- " ter-puncheon, matrix, ſtamp, die, pattern or " mould, of ſteel, iron, ſilver, or other metal " or metals, or of ſpaud, or of fine founders " earth,

RIDGELAY'S CASE.

" earth, or ſand, or of any other materials " whatſoever, in or upon which there ſhall be, " or be made or impreſſed, or which will make " or impreſs the figure, ſtamp, reſemblance, or " ſimilitude of both or either of the ſides or flats " of any gold or ſilver coin current within this " kingdom, &c. or ſhall knowingly buy, ſell, " hide or conceal, or without lawful authority " or ſufficient excuſe for that purpoſe, knowingly " have in his, her, or their houſes, cuſtody or " poſſeſſion, any ſuch puncheon, counter-pun- " cheon, matrix, ſtamp, die, or other tool or in- " ſtrument before-mentioned every ſuch offen- " der or offenders, their counſellors, procurers, " aiders, and abettors, ſhall be guilty of high " treaſon."

It was fully proved that the puncheons were found in the priſoner's lodgings, and that he had them knowingly for the purpoſes of coining. The Jury accordingly found a general verdict *Guilty;* but as no caſe had been decided upon this branch of the Act, the Court wiſhed to have the opinion of the JUDGES upon the following evidence of the Engraver of the Mint, Whether theſe were or were not puncheons within the meaning of the legiſlature?

" The puncheons found in the priſoner's cuſ- " tody are complete, and are hardened ready " for uſe; but it is impoſſible to ſay that the " ſhillings which were found, were actually made " with theſe puncheons. The impreſſions are " too feint to be exactly compared; but they " have the appearance of having been made with " them. The manner of making theſe puncheons is as follows: A true ſhilling is cut away " to the outline of the head; that outline is fix-

" ed

" ed on a piece of ſteel, which is filed or cut " cloſe to the outline. This is a puncheon; and " the puncheon makes the die, which is the " counter-puncheon. A puncheon is complete " without letters, but it may be made with let- " ters upon it; though from the difficulty and " inconvenience it is never ſo made at the Mint; " but after the die is ſtruck, the letters are en- " graved on it. A puncheon alone without the " counter-puncheon will not make the figure; " but to make an old ſhilling, or a baſe ſhilling " current, nothing more is neceſſary than theſe " inſtruments. They may be uſed for other " purpoſes, ſuch as making ſeals, buttons, me- " dals, or other things where ſuch impreſſions " are wanted." RIDGE-LAY'S CASE.

On the firſt day of Hilary Term 1779, Eleven of the JUDGES (*abſenté* L. C. J. *De Grey*) were unanimouſly of opinion, That this was a puncheon within the meaning of the Act; and at the February Seſſion following the priſoner received judgment of high treaſon.

CASE 87.

May's Caſe.

The words "*in man-* "*ner and* "*formfol-* "*lowing,* "*that is to* "*ſay,*" do not bind the party to recite the inſtrument, &c. *verbatim.* Doug. 194.

AT the ſittings at Weſtminſter, in Hilary Term 1779, before Mr. Juſtice *Buller*, the defendant was tried on an indictment for perjury in his evidence as the proſecutor of an indictment againſt *A.* for an aſſault. The indictment for the aſſault charged, that the proſecutor had received an injury, "*whereby his life was greatly deſpair-* "*ed of.*" The indictment for the perjury introduced the firſt indictment in theſe words, "which "indictment was preſented *in manner and form* "*following, that is to ſay,*" and then ſet forth in *hæc verba;* but in reciting the paſſage abovementioned, the word "*deſpaired*" was omitted.

The Counſel for the defendant admitted that it was not neceſſary to have recited the indictment for the aſſault; but it was contended, that the proſecutor by the words "*in manner and form fol-* "*lowing, that is to ſay,*" had undertaken to recite it; and that having ſo done, he was bound to ſet it forth *verbatim.*

But the learned Judge over-ruled the objection. He ſaid that the word "*tenor*" had ſo ſtrict and technical a meaning as to make a literal recital neceſſary (*a*); but that by the words, "*in man-* "*ner and form following, that is to ſay* (*b*)," nothing more was requiſite than a ſubſtantial recital: the variance therefore in the preſent caſe was only matter *of form*, and did not vitiate the indictment. He mentioned alſo a caſe where the variance was "*undertood,*" in the recital of an affidavit

(*a*) The word "*a-* "*foreſaid*" implies and binds the party to an exact recital. Boyce v. Whitaker, Dougl. 97.

(*b*) See the King v. Powel, ante, p. 76.

affidavit in an indictment, inſtead of "*under-*"*ſtood;*" in which, though the introductory words were, "*to the tenor and effect following,*" *&c.* the Court determined that the variance was not fatal *(a)*.

MAY'S CASE.

(a) See the King v. Beech, ante, p. 137.

The defendant was convicted; and on motion to the Court of King's Bench a rule was granted, on the ground of this variance, to ſhew cauſe why the verdict ſhould not be ſet aſide, and a judgment of acquittal entered: but it was afterwards dropped without argument; and in the Eaſter Term following the defendant was called upon his recognizance, in order that judgment might be pronounced againſt him.

Donnally's Caſe.

CASE 88.

To obtain money from a perſon againſt his will, by threatening to accuſe him of unnatural practices, amounts to the crime of ROBBERY.

AT the Old Bailey, in February Seſſion 1779, *James*, ALIAS *Patrick Donnally* was tried before Mr. Juſtice *Buller*, and found guilty of having committed two ſeveral highway robberies upon the perſon of the Honourable *Charles Fielding*, Eſq; ſon of the Earl of *Denbigh*. But the judgment was reſpited, and the following caſe ſubmitted to the opinion of the JUDGES.

Caſe. On the 18th January, 1779, the proſecutor Mr. *Charles Fielding* dined at Mrs. *Cotten*'s, in Harley-ſtreet, Cavendiſh-ſquare. As he was returning through Soho-ſquare towards the Play-houſe,

DONNALLY'S CASE.

houſe, between the hours of ſix and ſeven o'clock in the evening, he met the priſoner, whom he had never ſeen before. The priſoner deſired that Mr. *Fielding* would give him a preſent. Mr. *Fielding* aſked, "For what?" The priſoner anſwered, "*You had better comply, or I will take you before a Magiſtrate, and accuſe you of an attempt to commit an unnatural crime.*"

Mr. *Fielding* then gave him half a guinea, which the priſoner ſaid was not ſufficient; but Mr. *Fielding* had no more in his pocket. On the 20th January, about four o'clock in the evening, Mr. *Fielding* met the priſoner again in Oxford-ſtreet, who made uſe of the ſame threats as before; ſaid Mr. *Fielding* knew what paſſed in Soho-ſquare; and unleſs he would give him more money, he would take him before a Magiſtrate and accuſe him of the ſame attempt, and that it would go hard againſt him unleſs he could prove an *alibi*. Mr. *Fielding* then went to the ſhop of Mr. *Walter*, a grocer in Old Bond-ſtreet. The priſoner followed him, and ſtaid on the outſide of the door. When Mr. *Fielding* went into the ſhop, he took a guinea out of his pocket, gave it to Mr. *Walter*, and deſired he would give it to the man at the door; which Mr. *Fielding* ſaw him do, and then the priſoner went away. Mr. *Fielding* ſaid he was exceedingly alarmed at both the times, and under that alarm gave the money. He was not aware what were the conſequences of ſuch a charge, and he apprehended it might coſt him his life.

The Jury were deſired to conſider, *firſt*, Whether they were ſatisfied that Mr. *Fielding* delivered his money through fear, and under an apprehenſion

ſion that his life was in danger? *Secondly*, If they did not think that Mr. *Fielding* apprehended his life was in danger, whether the money was not obtained by means of the priſoner's threats, and againſt the will of Mr. *Fielding?* DONNALLY'S CASE.

The Jury found him guilty: and ſaid they were ſatisfied that Mr. *Fielding* delivered his money through fear, and under an apprehenſion that his life was in danger.

The queſtion is, Whether this amounts in law to A ROBBERY? *Signed*, F. BULLER,
19th Feb. 1779.

On the 29th April following, the twelve Judges aſſembled at L. C. J. *De Grey*'s houſe in Lincoln's-Inn Fields, for the purpoſe of hearing Counſel upon this caſe. It was argued by Mr. *Howarth* for the Crown, and by Mr. *Graham* for the priſoner. The Counſel for the Crown ſpoke firſt, and afterwards replied to the arguments by the Counſel for the priſoner. The Counſel then withdrew, and the JUDGES debated the point among themſelves, and then gave their ſeveral opinions, beginning with the junior Judge.

At the enſuing May Seſſion at the Old Bailey, Mr. Juſtice *Willes* delivered the reſult of their deliberations to the following effect.

The queſtion ſubmitted to the Judges was, "Whether this offence amounts to a robbery." This queſtion has been argued by Counſel, both

DONNALLY'S CASE.

for the priſoner and for the Crown. The twelve Judges have inveſtigated the ſubject, and delivered their ſentiments *ſeriatim*; and they are unanimouſly of opinion, That the priſoner at the bar is guilty of the crime of which he has been convicted.

The grounds and principles upon which this determination has been formed, I ſhall endeavour to ſtate to the Court with equal brevity and perſpicuity.

The definition of robbery, as it is given by Sir *William Staundforde*, Sir *Matthew Hale*, and Mr. Serjeant *Hawkins*, is "a felonious and violent taking of *any* money or goods from the perſon of another, putting him in fear;" from which it is evident, that to conſtitute the crime of robbery, three ingredients are neceſſary: *firſt*, a felonious intention, or *animus furandi*: *ſecondly*, ſome degree of violence, or putting in fear: *thirdly*, a taking from the perſon of another. But as the Judges declared, they did not mean to draw the exact line what ſhould or what ſhould not be conſtrued a robbery, but that every caſe muſt depend on its own particular circumſtances, it will be ſufficient for me to ſhew that the facts proved in the preſent caſe, are within the definition of that offence.

Firſt, The felonious intention, or *animus furandi*.

The priſoner, a ſtranger to Mr. *Fielding*, ſtops him in the ſtreet during the duſk of the evening, and deſires "that he would give him a preſent;" and when he is aſked, "For what?" he replies, "You

" You had better comply, or I will take you be- DONNAL-
" fore a Magiſtrate, and accuſe you of an at- LY'S
" tempt to commit an unnatural crime." This CASE.
conduct will not bear two conſtructions. It is clear that he laid in the way for the purpoſe of obtaining money, againſt the will of Mr. *Fielding;* and wherever one man obtains property from the poſſeſſion of another *againſt his will*, the law preſumes the act to proceed from a felonious intention, unleſs the circumſtances under which it was done evince the contrary; for the ſecurity of private property is the care of the law, and the preſumptions which it raiſes to attain the end, cannot be repelled by even a ſpecious pretence of right; much leſs in the preſent caſe, where the baſeneſs of the deſign is apparent. Nor will the law ſuffer its object to be evaded by an ambiguity of expreſſion; for if a man *animo furandi* ſays, " Give me your money—Lend me your money—
" Make me a preſent of your money," or words of the like import, they are equivalent to the moſt poſitive order or demand; and if any thing be obtained in conſequence, it will form the firſt ingredient in the crime of robbery.

The *ſecond* point conſidered was, Whether the priſoner had uſed that degree of violence, or inſpired that degree of fear, which the law holds neceſſary to conſtitute this offence. In the definition above-mentioned, theſe two words are included as deſcriptive of the cauſe and the effect; but the law does not in this caſe require an *actual violence* upon the perſon, or an exiſting fear in the mind. A man with a cutlaſs under his arm, or a piſtol in his hand, demands and obtains the money of another without touching his perſon. Here no actual violence is uſed. " Suppoſe,"

DONNALLY'S CASE.

says Mr. Juſtice *Foſter*, p. 128. "the true man "is knocked down, without any previous warn- "ing to awaken his fears, and lieth totally in- "ſenſible while the thief rifles his pockets; "where is the circumſtance of exiſting fear?" And yet in both theſe caſes the crime would be robbery. The putting in fear need not be laid in an indictment for this offence, nor the fact of fear proved upon the trial; but if it be laid to be done violently and againſt the will, the law *in odium ſpoliatoris* will preſume it. It is not even neceſſary that there ſhould be *actual danger*; for a robbery may be committed without uſing an offenſive weapon; as by uſing a tinder-box, or a candleſtick inſtead of a piſtol. A reaſonable *fear of danger*, cauſed by the exerciſe of a *conſtructive violence*, is ſufficient; and where ſuch a terror is impreſſed upon the mind as does not leave the party a free agent, and in order to get rid of that terror he delivers his money, he may clearly be ſaid to part with it againſt his will. Nor need the degree of conſtructive violence be ſuch, as in its effects neceſſarily imports a probable injury; for when a villain comes and demands money, no one knows how far he will go; and "if the fact be attended with ſome circum- "ſtances of terror and violence, which in com- "mon experience are likely to induce a man to "part with his property, for the ſafety of his "perſon," it is all the law requires. Sir *Matthew Hale*, 532. cites a caſe from the Year-Books of Edward the Third (*a*), which carried this doctrine ſtill farther. "If thieves come to rob a "man, and finding little about him, enforce "him by menace of death to ſwear on a book "to fetch them a greater ſum, which he doth "accord-

(*a*) 12 E. III. 3 f. 14. 4 Hen. 4.

" accordingly, this is a taking by robbery (*a*) :" and yet when he fetches the money, he is removed from all terror but the fear of breaking his oath, and is out of the reach of violence.

DONNALLY'S CASE.

(*a*) Staundford, 276 cites this case; but he remarks that in the reign of Edw. 3. *volentas reputabatur pro facto.*

But let us see how far the circumstances which attended the fact in the present case, will bring it within these rules of law. A young gentleman from school is accosted at night in London streets by a person he never saw before, whom he must suspect to be a villain. The stranger *demands* a present. This conduct seems sufficient to satisfy the legal idea of robbery. But the prisoner goes further, and says, " You had better comply, or " I will take you before a Magistrate." This is a threat of *personal violence*, for the prosecutor had every thing to fear, in being dragged through the streets as a culprit charged with an unnatural crime. The threat must necessarily and unavoidably impart intimidation. It is equivalent to actual violence; for no violence that can be offered, could excite a greater terror in the mind, or make a man sooner part with his money. The menace is much stronger than that in *Harman's Case*, 1 *Hale*, 534. and it is implied, that if the violence in that case had preceded the theft, it would have been robbery. What can operate more powerfully on the mind than a menace to do that, which in its consequences would blast the fairest fame, and ruin for ever the brightest character? It is much more likely that such a menace should occasion fear, than those which Mr. Serjeant *Hawkins* has mentioned in his Pleas of the Crown. It is however sufficient to implant a reasonable fear of danger, which might operate *in constantem virum*, as well as *in matriculosum*, much more on the mind of a boy come from school for the

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the holidays. It was argued by the priſoner's Counſel that this was a *fraudulent extorting*, and not a *taking by violence;* but in many caſes fraud will ſupply the want of violence; as in burglary, where the breaking is a neceſſary ingredient: and if a perſon fraudulently get admiſſion into a houſe by colour of law, or under pretence of taking lodgings, or of having buſineſs, it has frequently been held ſufficient proof of a conſtructive breaking. Several of the Judges thought there was a great analogy between theſe caſes and the preſent, and therefore that it ought to be governed by the like principles. There is no *actual breaking* in thoſe caſes of burglary; there is no *actual violence* in the preſent caſe; yet the fraud in both amounts to a *conſtructive breaking* in one caſe, and to a *conſtructive violence* in the other; but the determination did not turn entirely upon this argument.

As to the *third* ingredient, *viz.* a taking from the perſon, the Judges were of opinion, That ingenuity could not raiſe a doubt upon the point.

But before I conclude, it may be proper to ſtate the ſeveral authorities which ſupport this determination of the Judges. The *firſt caſe* was that of *James Brown*, who was tried and convicted at the Old Bailey, in October 1763, for a highway robbery on *Ralph Hudſon;* and he was executed. The ſecond caſe was that of *Thomas Jones*, tried and convicted before Mr. Baron *Hotham*, in February Seſſion 1776; and his caſe was determined to be robbery by all the Judges at Serjeants Inn Hall; and he was executed.—The third caſe was that of *Robert Harrold*, in laſt June Seſſion, who was tried, and convicted of the like

like charge; but he was afterwards reprieved upon ſome doubt on the evidence. In all theſe three caſes there was this difference from the preſent caſe, that ſome actual violence was proved, as *taking and ſeizing by the arm or collar*. But the Judges all held, this did not make any material diſtinction; but that ſufficient was proved in this caſe for the Jury to find the priſoner guilty of ROBBERY.

DONNALLY'S CASE.

See Hickman's caſe poſt.

The King *verſus* Bury.

CASE 89.

IN the King's Bench, Eaſter Term 19 Geo. 3. a rule had been obtained to ſhew cauſe why an attachment ſhould not iſſue againſt the defendant, who was Clerk of Aſſize on the Norfolk Circuit, for not obeying a writ of *Certiorari* to remove an indictment for murder, and a ſpecial verdict founded upon it *(a)*. On ſhewing cauſe againſt the rule, it was inſiſted by the defendant's Counſel, that he had a right to retain the record till he ſhould be paid his fees for drawing, ingroſſing, *&c.* which the Attorney for the priſoner had refuſed to do, on the ground of their being exorbitant.

A Clerk of Aſſize has not a lien upon the records in his cuſtody for his fees; and if he draws an indictment with unneceſſary prolixity, he may be ordered to pay the extraordinary expence.

(*a*) Borthwick's caſe, Dougl. 197.

Lord Mansfield ſaid, he ſhould be very unwilling to determine that a Clerk of Aſſize has a lien on the records of the Court for his fees, for that he foreſaw great inconvenience from ſuch a doctrine; it was therefore referred to the Maſter: and on the Attorney for the priſoner undertaking to pay as much as he ſhould report to be due, the record

BURY'S CASE.

cord was returned into Court, and the rule for the attachment discharged *(a)*.

(*a*) In the same Term the Court referred an indictment for perjury against *May*, which had been removed from *Hicks's Hall*, to the Master, to see what part of the record was necessary; and made an order that the Clerk of the Peace should pay the expence incurred by such unnecessary part.—N. B. It was drawn to an exorbitant length, by stating all the continuances on the former prosecution, &c. which is rendered unnecessary by the express words of the 23 Geo. 2. c. 11. s. 1.

CASE 90.

Hedges's Case.

What shall be said a fixture to the freehold.

AT the Old Bailey, May Session 1779, the prisoner was indicted for stealing six light glazed window sashes. The window-frames from which they were taken were fixed into their proper places, but the sashes were neither hung nor bedded in the frames, but were fastened in by laths nailed across the frames to prevent their falling out.

The Court *(a)* held they were not fixed to the freehold.

(*a*) Mr. Justice Willes Mr. Baron Hotham, Mr. Serjeant Glynn.

Jones's

Jones's Caſe.

CASE 91.

AT Chelmsford, 21ſt July, 1779, *William Jones*, otherwiſe *Thorowgood*, was indicted before *Lord Mansfield*, for that he, having in his cuſtody a certain forged paper writing *purporting* to be a BANK NOTE (deſcribing it) as followeth; *that is to ſay:*

" N° F. 946.

" I PROMISE to PAY John Wilſon, Eſq. OR
" BEARER, TEN POUNDS.

" London, March 4, 1776.

" £. TEN. " For Self and Company of my
" ENT^d. *John Jones*. " Bank in England."

* * *

did diſpoſe of and put away the ſaid forged paper writing as and for a good and true bank-note, well knowing the ſame to be forged. There were other counts charging it to be—*Firſt*, A certain forged and counterfeited note; and *Secondly*, A forged paper writing *purporting* to be a promiſſory note for payment of money; and laying the offence to have been committed, *firſt*, with an intention to defraud the Bank of England; and *ſecondly*, with an intention to defraud *James Rayner*.

In an indictment forforgery, the words " *purporting* to be " a bank-" note," mean that the inſtrument upon *the face of it* appears to be a bank-note; and the want of ſuch appearance cannot be ſupplied by the repreſentation of the party uttering it.

The Jury acquitted the priſoner as to thoſe counts which charged an intent to defraud the *Bank of England;* and as to the other counts, they found a ſpecial verdict to the following effect: That the paper writing purporting to be a bank-note, is not a note filled up by any of the officers of the Governor and Company of the Bank of

JONES'S CASE.

of England, or entered in any of their books, but is forged: That the ſaid *William Jones*, otherwiſe *Thorowgood*, well knowing the ſaid paper writing not to be a note of the Governor and Company of the Bank of England, but to be forged, averred the ſame paper writing to be a good bank-note, and diſpoſed of and put away the ſame as a good bank-note to *James Rayner*, with intent to defraud the ſaid *James Rayner*; and that the ſaid *James Rayner*, took the ſaid paper writing, and gave the full value of Ten Pounds for the ſame to the ſaid *William Jones*, otherwiſe *Thorowgood*, believing the ſaid paper writing to be a true bank-note: That the Governor and Company of the Bank of England frequently pay bank-notes, which are filled up by their officers and entered in their books, although the ſame happen not to be ſigned: That the paper writing purporting to be a promiſſory note for the payment of money, is not a note filled up by any of the officers of the Bank of England, &c. but is forged: That the ſaid *William Jones*, otherwiſe *Thorowgood*, well knowing the ſaid laſt mentioned paper writing not to be a note of the Governor and Company of the Bank of England, but to be forged, *averred* that it was a good bank-note, and uttered and publiſhed it as a good bank-note to *James Rayner*, as above-mentioned. But whether, &c.

On Wedneſday, the 24th of November, 1779, this ſpecial verdict was argued in the Court of King's Bench by Mr. *Fielding*, on the part of the proſecution, and by Mr. *Mingay*, on the part of the priſoner.

The Court were of opinion, That the repreſentation which the priſoner had made to *Rayner*, *viz.*

viz. That it was a good bank-note, could not alter the *purport* of it, which is what appears upon the face of the inſtrument itſelf; for although ſuch *falſe* repreſentations might make the party guilty of a fraud or cheat, they could not make him guilty of felony. JONES'S CASE.

Mary Adey's Caſe.

CASE 32.

THIS was a ſpecial verdict found at the Old Bailey, in September Seſſion 1779, upon an indictment againſt *Mary Adey* for the wilful murder of *William Barnet.*

Quære, If a woman who in a tranſport of paſſion, kills a peace-officer who is about to take the man ſhe cohabits with to priſon, under a warrant which turns out to be illegal, is guilty of murder or manſlaughter?

The Jurors find, That the deceaſed went, in company with one *David Prothero*, who was a Conſtable of the pariſh of Saint Martin's in the Fields, to the houſe of one *Ward*, in Caſtle-ſtreet, in that pariſh, in whoſe houſe the priſoner cohabited with a man of the name of *Farmello.* That *Prothero* went to the houſe of *Ward*, accompanied by *Barnet*, for the purpoſe of apprehending *Farmello* as an idle and diſorderly perſon, under the ſtatute 19 Geo. 2. c. 10. That *Prothero* had a general ſearch-warrant for that purpoſe. That upon *Prothero*'s coming to the houſe of *Ward*, he, together with *Barnet* and others, went up ſtairs to the lodging-room of *Farmello*, in which *Farmello* and the priſoner cohabited at that time.—That *Prothero* did not know *Farmello.* That *Prothero* knocked at the door, and demanded to be admitted. That a male voice called out from within, "Who's there?" That *Prothero* anſwered, "It is me." Upon which a ſervant-maid belonging to the houſe ſaid, there was another door by which they might enter, the bolt of which was on the inſide of a room not belonging to

ADEY'S CASE.

to *Farmello's* lodgings. That this door was unbolted, and opened by two men of the name of *Ellis* and *Stephens*. That *Prothero* and *Barnet* then entered *Farmello's* room. That *Prothero* ſaid to *Farmello*, "You muſt come along with us."—*Farmello* ſaid, "For what?" That *Barnet* ſaid, "Come, come, you muſt go." That before *Prothero* could anſwer *Farmello*, the priſoner ſtepped paſt *Prothero*, and ſtruck *Barnet* under the left-arm with a knife ſhe then had in her hand, ſaying, "By God he ſhall not go." That the knife was left ſticking in the ſide of *Barnet*, who turned round, ſaying he was a dead man. That *Barnet* died of that wound about four o'clock the next day. That *Farmello* was not an object of the ſaid Act of Parliament. If the Court, *&c.*

The Queſtion was, Whether the offence amounted to murder or manſlaughter? And it was ſeveral times under the conſideration of the Judges: but they were much divided in their opinions; and the queſtion was never determined.

The priſoner laid eighteen months in gaol, and was then diſcharged.

N. B. This Caſe was argued in the Exchequer Chamber on the 19th of April, 1780, by Mr. *Howarth* for the Crown, and Mr. *Erſkine* for the priſoner, before *Ten Judges*, viz. *Lord Mansfield; L. C. B. Skynner; Gould, Willes, Aſhhurſt, Buller, Nares*, Juſtices; *Eyre, Perryn*, and *Hotham*, Barons; and the Caſes of *Queen v. Tooley*, 2 *Ld. Raym.* 1296. *Holt*, 485. 11 *Mod.* 242. *Huggins' Caſe*, *Fitzg.* 177. 2 *Stra.* 882. 2 *Ld. Raym.* 1574. 9 *St. Tr.* 112. *Bucknal's Caſe*, *Styles*, 469. *Mawgridge's Caſe*, *Kely*, 136. *Curtis' Caſe*, *Foſter*, 135, 312, 314. 1 *Hale*, 465. were cited, and relied on.

John

John Pear's Caſe.

CASE 93.

THIS caſe was reſerved by Mr. Juſtice *Aſhhurſt*, at the Old Bailey, in September Seſſion 1779.

A horſe obtained under pretence of hiring it for a day is felony, if the jury find the hiring was *animo furandi*.

The priſoner was indicted for ſtealing a black mare, the property of *Samuel Finch*. It appeared in evidence, that *Samuel Finch* was a Livery-Stable-Keeper; and that the priſoner had hired the mare of him to go to Sutton in Surrey and back again, ſaying he lodged at No. 25, in King-ſtreet, and ſhould return about eight o'clock the ſame evening. He did not return; and it was proved that he had ſold the mare on the very day he had hired her, to one *William Holls*, in Smithfield Market; and that he had no lodging at the place to which he had given the proſecutor directions.

The Jury found that the facts above ſtated, were true; and alſo that the priſoner had hired the mare with a fraudulent view, and intention of ſelling her immediately.

The queſtion was referred to the Judges, whether the delivery of the mare by the proſecutor to the priſoner, had ſo far changed the poſſeſſion of the property, as to render the ſubſequent converſion of the mare a mere breach of truſt, or whether the converſion was felonious?

The Judges were unanimouſly of opinion, That the queſtion, as to the original intention of the priſoner in hiring the mare, had been properly left to the Jury; and as they had found, that his

See the caſe of Sharpleſs and another, ante, p. 95.

PEAR'S CASE.

his view in ſo doing was fraudulent, the parting with the *property* had not changed the nature of the *poſſeſſion*, but that it remained unaltered in the proſecutor at the time of the converſion, and that the priſoner was therefore guilty of felony. See *Kelynge*, 24, 81. *Shower*, 50, 57. *Aikles's Caſe*, *O. B. January Seſſion* 1784. *Charlewood's Caſe*, *O. B. February Seſſion*, 1786. *Major Semple's Caſe*, *Poſt. (a)*.

(*a*) At the O. B. October Seſſion 1729. *John Tunnard* was tried for ſtealing a brown mare, the property of *Henry Smith*.—The proſecutor lived in the Iſle of Ely, and he *lent* the priſoner the mare to ride to a place three miles diſtant; inſtead of which, the priſoner rode her up to London, and ſold her. Lord Chief Juſtice *Raymond* left it with the Jury *quo animo* he had rode to London, and they found him guilty. Mr. Juſtice *Denton* and Mr. Baron *Hale* were preſent, and concurred that it was felony by reaſon of the agreement; for if there had been no agreement, the privity would have remained, and it could not have been felony. MS.

CASE 94.

John Taylor's Caſe.

The *drawee* of a bill may prove that a *receipt* indorſed for the value of it is forged, on receiving a releaſe from the *indorſee*.

AT the Old Bailey, in October Seſſion 1779, *John Taylor* was tried before Mr. Juſtice *Willes*, preſent Mr. Baron *Eyre*, for that he having in his poſſeſſion a bill of exchange in the words and figures following:

"SIR, *Tamworth*, 2*d Auguſt*, 1779.

"One month after date pleaſe to pay to my "order the ſum of Twenty Pounds, value receiv-"ed, as *per* advice from

"THOMAS HARPER."

"To Mr. JOSEPH CUFF,
"*No.* 125, *Whitechapel*,
"LONDON."

feloniouſly did make, forge, and counterfeit a receipt and acquittance for the ſum of Twenty Pounds,

Pounds, as followeth, "*Rec*^{d}. *W. Wilſon*," with intention to defraud the ſaid *Joſeph Cuff*. TAYLOR'S CASE.

There was a ſecond count for uttering with the like intention; and a third and fourth count for forging and uttering it with intention to defraud *John Briggs* and *Henry Sutton*.

Upon the bill being produced, it appeared, that "*Thomas Harper*," the drawer and payee, had indorſed it over, by *a ſpecial* indorſement, to "*Bird* and *Jones*," who had indorſed it *in blank*, and paid it away to Mr. *Sutton*, a London tradeſman then at Birmingham, who incloſed it with five other bills, in the preſence of the priſoner, in a letter directed to Meſſrs. *Briggs* and *Sutton*, on Garlick-Hill; and which letter was put into the poſt-houſe at Birmingham; but it never arrived as directed in London. Mr. *Briggs*, on receiving advice of theſe bills having been ſent, applied to Mr. *Cuff* to ſtop payment of the bill in queſtion; but Mr. *Cuff* had paid the bill, though it then wanted three days of being due.

To prove that it was the priſoner who had received the 2cl. and witneſſed that receipt in the name of "*W. Wilſon*," the Counſel for the proſecution *(a)* called Mr. *Cuff*; but the Court concurred with the priſoner's Counſel *(b)*, that he was not a competent witneſs; for he had, by paying the bill before it became due, opened a queſtion, whether he was not liable to repay the money. On receiving a releaſe however from *Sutton* and *Briggs*, the indorſers of the bill, his evidence was received *(c)*.

(a) Mr. Serjeant Davy, Mr. Serjeant Walker.

(b) Mr. Morgan.

(c) It was doubted whether Mr. Cuff ought not to have been a witneſs for the drawer.

TAYLOR'S CASE.

The Evidence for the proſecution being cloſed, the priſoner's Counſel ſubmitted to the Court, that it was eſſential to the commiſſion of forgery that the act ſhould be done in the name of another (*a*); but that in the preſent caſe, for any thing that had appeared to the contrary, there never was ſuch a perſon exiſting as the "*William Wilſon*," whoſe name was ſuppoſed to have been forged.—It was alſo ſubmitted, that THAT name could not have been uſed with an *intention to defraud*, becauſe the priſoner might as well have procured payment of the bill by writing the receipt in the name of "*John Taylor*" as in the name of "*William Wil-*"*ſon*;" and therefore the uſe of the fictitious name was not neceſſary to the accompliſhment of any fraud.

A receipt indorſed on a bill of exchange in a fictitious name, is a forgery, altho' it does not purport to be the name of any particular perſon.

(*a*) 3 Inſt. 169.

The Court however over-ruled both objections, and the Jury found the priſoner *Guilty*; but the judgment was reſpited, and the caſe referred to the conſideration of the twelve Judges, who were unanimouſly of opinion, That the priſoner was properly convicted (*a*).

(*a*) See the caſe of Edward Tuft, ante, p. 182.

The

The King *againſt* Spalding. CASE 95.

A tenant in poſſeſſion of a copyhold meſſuage is not guilty of ARSON by burning it, although it has been ſurrendered to the uſe of the mortgagee; for it is not the houſe of another while the tenant continues in poſſeſſion.

(a) *Quære*, If there was not a count in this indictment for ſetting fire to an *outhouſe*, againſt the ſtatute?

AT the Lent Aſſizes holden at Bury, for the county of Suffolk, in the year 1780, *William Spalding* was tried for Arſon, in having ſet fire to his *own houſe (a)*. The indictment contained two general counts; the firſt deſcribing the offence as at common law; the ſecond concluding againſt the ſtatute of 9 Geo. 1. c. 22.

The premiſes were copyhold, of which the priſoner was tenant in poſſeſſion; and on the day laid in the indictment, he wilfully ſet fire to a girder in the back part of the houſe, by the means of which a great part of the timber of *the roof* and the entire *thatch* of the houſe were conſumed. The houſe was ſituated in the village of *Harteſt*, detached from any other houſe; but there were other houſes on each ſide of it, within the diſtance of four yards. In the month of January, 1776, the priſoner had ſurrendered the houſe into the hands of the lord of the manor, to the uſe of one *Benjamin Nott*, his heirs and aſſigns, for ſecuring the payment of ſixty pounds, with legal intereſt, on the third of July next following the date of the ſurrender; but *Benjamin Nott* had never been admitted upon the ſurrender. The priſoner had inſured the premiſes from fire to a conſiderable amount, and had paid the premium to the Lady-Day ſubſequent to the commiſſion of the fact. The premiſes were alſo inſured by *Benjamin Nott*, the mortgagee.

SPALDING'S CASE.

The Jury found the priſoner *guilty;* but the judgment was reſpited, and the following points ſubmitted to the conſideration of the TWELVE JUDGES.

Firſt, Whether the indictment was properly adapted to the caſe?

Secondly, Whether any evidence as to the mortgage and ſurrender of the premiſes ought to have been received?

Thirdly, Whether, under all the circumſtances of the caſe, the offence amounts to *Arſon* at the common law, or to a felonious burning within the meaning of the ſtatute?

L. C. J. *De Grey* abſent, and one vacant.

On the firſt day of Eaſter Term, 1780, this caſe was propounded to Ten of the Judges, at *Lord Mansfield's* Chambers; and they were unanimous, That as the indictment was for burning his *own houſe*, it was inſufficient; for that the crime of *Arſon* at common law conſiſts in maliciouſly and voluntarily burning the houſe of *another;* and the ſtatute of 9 Geo. 1. c. 22. does not alter the nature of the crime, or create any new offence, but only excludes the principal more clearly from the benefit of clergy than he was excluded before. The reſolution in *Holmes's Caſe* (*a*) has been too long eſtabliſhed to be controverted, and the interpretation of the ſtatute muſt be governed by that determination. The circumſtance of the premiſes being inſured makes no difference in this caſe.

1 Hale. 556. Staund. 36. 3 Inſt. 66. 4 Bl. Com. 220.

(*a*) Cro. Car. 338.

The

The King *againſt* Breeme. CASE 96.

A tenant in poſſeſſion under an agreement for a leaſe for three years, from a leſſee, who held under a building leaſe, is not guilty of ARSON by ſetting the houſe on fire; and the 9 Geo. 1. c. 22. does not vary the nature of this offence.

AT the Old Bailey, in April Seſſion 1780, *Andrew Breeme* was indicted before Mr. Baron *Eyre*, for that he, about the hour of twelve in the night, a certain houſe feloniouſly, wilfully, and maliciouſly did ſet on fire and burn. The indictment conſiſted of ſix counts, charging the offence to have been committed, *firſt*, againſt the common law; and, *ſecondly*, againſt the ſtatute 9 Geo. 1. c. 22. and laying it to be the houſe, *firſt*, of *William Bolton*; *ſecondly*, of *Stone Tuppen*; *thirdly* of *Andrew Breeme*.

The Jury found the priſoner *Guilty;* but the judgment was reſpited, and the queſtion, Whether the conviction was legal? referred to the twelve Judges upon the following fact:

Bro. Cor. 135, 155. Staund. 36. 2 Inſt. 188. Dalt. c. 105. 3 Inſt. 66. 1 Hale, 556. 4 Co. 20. 4 Bl. Com. 221, 366, 310. 1 Hawk. P.C. 166.

That the priſoner wilfully and maliciouſly ſet on fire and burned the houſe mentioned in the indictment: That he was tenant in poſſeſſion of the houſe, under a written agreement for a leaſe for three years from *Stone Tuppen:* That *Stone Tuppen* had built the houſe under a leaſe from *William Bolton* for ninety-nine years; and, That *William Bolton* was tenant in fee ſimple of the land on which the houſe was built.

On the firſt day of Trinity Term nine of the Judges *(a)* aſſembled at Lord Chief Baron *Skynner's* Chambers; and they were unanimouſly of

(a) L. C. B. Skynner, Mr. Juſtice Gould, Mr. J. Willes, Mr. J. Aſhhurſt, Mr. J. Nares, Mr. J. Buller, Mr. B. Eyre, Mr. B. Hotham, Mr. B. Perryn.

BREEME'S CASE.

opinion, That the priſoner, under the circumſtances of the preſent caſe, was not guilty of *Arſon*. The law upon this ſubject, they ſaid, had been too long, and too firmly eſtabliſhed, by *Holmes's Caſe*, to be now departed from. Some of the Judges, however, ſeemed to doubt the propriety of that determination, and ſaid, that if the queſtion had been unſettled they ſhould have been of a different opinion; but the majority of the Judges held, that the determination of *Holmes's Caſe* was right, for that the principle of it was the protection of the perſon in the actual and immediate poſſeſſion of the houſe. As to the ſtatute 9 Geo. 1. c. 22. they held, that it did not vary the nature of the offence as it ſtood at common law, that Act being merely intended to clear the doubt which had ariſen from the reaſoning in *Poulter's Caſe (a)*, as to the excluſion of the principal offender from the benefit of clergy; and in this view, they ſaid, it is conſidered in Mr. Juſtice *Blackſtone's* Commentaries.

(a) 11 Co. 29.

4 Bl. Com. 320.

CASE 97.

Patrick Madan's Caſe.

A priſoner convicted of a capital crime, whoſe ſentence is reſpited during the King's pleaſure, and who, on having received a pardon on condition of tranſportation for life, is afterwards found at large in Great Britain, without lawful cauſe, ſhall be referred back to his original ſentence.

AT the Old Bailey, in December Seſſion 1780, *Patrick Madan* was capitally convicted on the ſtatute 10 and 11 W. 3. c. 23. for privately ſtealing a collection of jewels in the ſhop of *William Storey*, and judgment of death was paſſed upon him at the concluſion of the Seſſion. The execution of his ſentence was afterwards reſpited during his Majeſty's pleaſure; and he accepted a par-

don,

MADAN'S CASE.

don, *on condition* of being tranſported to the coaſt of Africa for and during the term of his natural life. In conſequence of this pardon, he was delivered from Newgate under an order of the Court, and, with other convicts, put on board a ſhip commanded by Captain Mackenzie. They ſet ſail for Africa; but the ſhip was driven by contrary winds into the Cove of Cork in Ireland; from which place he made his eſcape, and returned to London, where he was apprehended, and committed to Newgate, for being found at large contrary to the condition of his Majeſty's pardon.

See the caſe of Maximillian Miller, ante, p. 73. and Aickles's caſe, O. B. Sept. Seſſ 1785. poſt.

No indictment was ever preferred againſt him for the new felony; but on the 7th of December, 1781, the Court ordered notice in writing to be given to him, to ſhew cauſe the next day why execution ſhould not be awarded againſt him on his former ſentence.

The following day, on being put to the bar, and his identity and the record of his former conviction being proved, he ſtated to the Court, that while the ſhip remained in the Cove of Cork, he, with many others of the crew, were ſent on ſhore by Sir *John Irwin*, Commander in Chief, and put into ſick quarters; and that before his recovery the Captain received orders from the Admiralty to ſail, which he obeyed, leaving him ſick, and unable to be removed, on ſhore; but not being prepared with witneſſes to prove theſe facts, he was remanded till the next Seſſion.

In January Seſſion, 1782, he was again put to the bar, and not being prepared with any evidence to prove the truth of the facts above ſtated, the Court were of opinion, That having broken the condition

MAD N'S CASE.

condition of pardon, he remained in the ſame ſtate in which he was at the time that pardon was granted, *viz.* under ſentence of death, with a reſpite of that ſentence during his Majeſty's pleaſure; and he was accordingly remanded under his former ſentence.

It was afterwards ſubmitted to the conſideration of the twelve Judges, Whether, under all the circumſtances of this caſe, the priſoner was liable to ſuffer death, wtthout benefit of clergy, if he had been indicted and convicted under the ſtatute of 8 Geo. 3. c. 15.? or, Whether he had been properly referred to his original ſentence in December Seſſion 1780, with the reſpite during his Majeſty's pleaſure?

In April Seſſion 1782, he was informed by the Court, that it was his Majeſty's pleaſure, that he ſhould be tranſported to the Coaſt of Africa during the term of his natural life.

John

John Sheppard's Caſe.

CASE 98.

AT the Old Bailey, in September Seſſion 1781, *John Sheppard* was tried before Mr. Juſtice *Aſhhurſt*, for uttering the following order for payment of money, knowing it to be forged, with intention to defraud *James Elliot*.

Uttering an order for the payment of money under a *falſe repreſentation*, is evidence of knowing it to be forged.

" *Green-ſtreet*, 31*ſt July*, 1781.

" Meſſrs. *Brown* and *Collinſon*,

" Pay to Mr. *John Atkins* or bearer, ſix pounds " ſix ſhillings for

" H. TURNER."

The following facts appeared in evidence:

The proſecutor was a ſilverſmith; and the priſoner having looked out ſeveral goods at his ſhop to the amount of ſix guineas, pulled out his purſe, ſaying, " I believe I have not caſh enough about " me, but here is a draft on a banker, which is " the ſame thing as money; it will be paid when " preſented." He laid the draft on the counter, and deſired to ſee ſome ſilver ſpurs; but the proſecutor not having any of the kind which he deſcribed, the priſoner ſaid, " Then you muſt ſend " me a pair." The proſecutor took his order-book, and imagining the priſoner's name to be the ſame as that in which the draft was ſigned, he wrote, " *H. Turner, Eſq.*" The priſoner looked over him, and deſired him to add, " *Junr. Noah's* " *Row, Hampton Court*," and then went away.— It appeared that no perſon of the name of *H. Turner* kept caſh at *Brown and Collinſon's*, or lived in *Green-ſtreet*; nor could ſuch a place as *Noah's Row*,

See Rex v. Thorowgood, ante, p. 209.

SHEPPARD'S CASE.

Row, or ſuch a perſon as *H. Turner, jun*r. be found at *Hampton Court*.

The Jury found the priſoner *Guilty;* and he received judgment of death: but the execution of the ſentence was reſpited, and the propriety of the conviction ſubmitted to the conſideration of the Judges.

In January Seſſion 1782, the priſoner was put to the bar, and informed by Mr. *Recorder*, That the twelve Judges were unanimouſly of opinion, that the conviction was legal. The priſoner however received a conditional pardon, in conſideration of the long confinement he had ſuffered; and he was ſentenced (*a*) to raiſe gravel for three years on the river Thames.

(*a*) By virtue of 19 Geo. 3. c. 74. ſ. 28.

CASE 99.

Peat's Caſe.

The continuance of the property in the poſſeſſion of a ROBBER, is not required by the law to complete the crime.

OLD-BAILEY, December Seſſion 1781, the priſoner was indicted before Mr. Baron *Hotham*, preſent Mr. Juſtice *Willes*, for a highway robbery on *Richard Downe*, Eſq. by putting him in corporal fear and danger of his life, and taking from his perſon a ſilk purſe, value threepence, and twenty-three ſhillings in monies numbered.

The priſoner on horſe-back ſtopped Mr. *Downe's* carriage on Finchley Common, and demanded his money. Mr. *Downe* gave him his purſe: The priſoner took it, but immediately returned it again to Mr. *Downe*, ſaying, "If you value your purſe

"you

" you will pleaſe to take it back, and give me the " contents of it." Mr. *Downe* received it back, but while he was taking out the money, his ſervant jumped from behind the carriage and ſecured the priſoner. PEAT'S CASE. Hale's Sum. 70. 3 Inſt. 60, 69. Eden. 286. 1 Hawk. 147.

A doubt aroſe, Whether as robbing is only an aggravated ſpecies of larceny, there was a ſufficient *aſportation* in this caſe to conſtitute the offence? But the Court, held, that although the proſecutor did not eventually loſe either his purſe or his money, yet as the priſoner had in fact demanded his money, and under the impulſe of that threat and demand, the property had been once taken from the proſecutor by the priſoner, it was in ſtrictneſs of law a ſufficient *taking* to complete the offence, although the priſoner's poſſeſſion had continued for an inſtant only (*a*).

(*a*) *A.* requires *B.* to deliver his purſe, and he delivers it accordingly; but *A.* finding only two ſhillings in it, gives it him again, yet this is *a taking* by robbery. Cromp. 34. Dalt. c. 153. p. 492. 1 Hale, 533. For he who has once actually completed the offence, by taking the goods of another in *ſuch a manner* into his poſſeſſion, cannot afterwards purge it by any re-delivery. Sum. 70. 3 Inſt. 60. 1 Hawk. P. C. 147 The outrage offered to the rights of ſociety does not vary in its nature, becauſe it is ineffectual in its conſequences. Eden's P. P. L. 286. And the continuance of the property in the poſſeſſion of the robber, is not required by law. 3 Inſt. 69. See alſo Staund. 27.

John

CASE 100.

John Hevey's Caſe.

To utter an order for the payment of money under a *falſe aſſertion* of being the payee of it, is a miſdemeanour, if it appears that the order was made for the purpoſes of fraud; but ſuch an uttering is no evidence of forgery.

See Sheppard's caſe, ante. Dougl. 300.

AT the Old Bailey in January Seſſion, 1782, *John Hevey* was indicted on the ſtatute 2 Geo. 2. c. 25. before Mr. Juſtice *Aſhhurſt*, for forging an indorſement on the back of a bill of exchange, in the name of "*B. M'Carty*," with intent to defraud *William Maſters* and *Edward Beauchamp*.

There was a ſecond count, for uttering and publiſhing a forged indorſement, in the name of "*B. M'Carthy*" with the like intention.

"No. 59. £. 30: 00: 0: BATH BANK,
"*November* 19, 1781.
"Thirty-one days after ſight, pay Mr. *Bernard M'Carthy* or order, Thirty Pounds, Value received, for *Smith, Moore, and Co.*
"JER. CONNELL."
"To *Rich. Beatty and Co.*
"N°. 19, *Gt. St. Helens, London.*"
(*Acc. R. B. and Co.*)

It appeared in evidence, that the priſoner, by the name of *John Hevey*, had procured the copper-plate to be engraved from which the ſkeleton of the bill in queſtion had been printed. In the month of November, 1781, the priſoner went to the ſhop of the proſecutors, who were pawn-brokers in Holborn, bargained for a gold watch, at the price of eighteen guineas, and offered the *Bath Bank Bill* above deſcribed in payment. Mr. *Beauchamp* examined the bill, and ſhewing the indorſement to the priſoner, aſked him if his name was *M'Carthy*. The priſoner replied, "*Yes, Sir, it*
"*is.*

" *is. You have no occaſion to be afraid, it is better* " *than a note of the Bank of England; it is a* " *very good bill, and I have indorſed it.*" Mr. *Beauchamp*, however, refuſed to take it, until he had ſent his ſervant with it into *Great St. Helen*'s, to know whether the acceptance *Richard Beatty and Co.* was genuine. The ſervant took the bill according to the directions, and received information from a gentleman who anſwered to the name of *Beatty*, that it was a good bill, and would be regularly paid when due. In conſequence of this information, the proſecutor let the priſoner have the watch, gave him 11l. 2s. in exchange, and a bill of parcels, with a receipt in the name of *M'Carthy* for the 18l. 18s. od. The bill was not paid, nor were there any ſuch perſons as *Smith, Moore, and Co.* to be found at Bath. The priſoner and *Beatty* were apprehended, and committed for the ſuppoſed forgery. In the priſoner's cuſtody were found a number of notes of different dates and ſums, indorſed in the name " *B.* " *M'Carthy;*" but it was poſitively ſworn, that theſe indorſements, as well as that on the back of the bill in queſtion, were in the hand-writing of one *Bernard M'Carthy*, who lived in *St. Giles's*, and had abſconded.

The learned Judge directed the Jury upon the points of law; and they found a verdict, " That " the indorſement *B. M'Carthy* was in the hand-" writing of a perſon of that name, but that " *John Hevey*, the priſoner at the bar, had paſſed " himſelf upon the proſecutor Mr. *Beauchamp*, as " being *B. M'Carthy* the indorſer."

As this finding involved a queſtion of law which had never preciſely received a judicial determination,

HEVEY'S CASE.

tion, the queſtion was referred to the conſideration of the twelve Judges, Whether, if a man produces the real ſignature of a perſon exiſting, purporting to be the indorſement of ſuch perſon, and falſely declares that he is the identical perſon whoſe indorſement it purports to be, it amounts in point of law to the offence of forgery?

On the firſt day of Hilary Term, 1782, eleven of the Judges conferred upon this caſe; and at the Old Bailey, in February Seſſion following, Mr. Juſtice *Gould* delivered their unanimous opinion, That it did not amount to forgery. The ſtatute 2 Geo. 2. c. 25. ſays, "That if any perſon ſhall *falſely make*, or cauſe to be *falſely made*, any indorſement, &c. they ſhall be guilty of felony." There muſt therefore be a *falſe making* to conſtitute the crime of forgery; but in the preſent caſe, the Jury have found that the indorſement was *truly made*, by a real perſon whoſe names it purported to be.

The priſoner however was detained, and at the ſame Seſſion, *John Hevey* and *Richard Beatty* were indicted, with *Bernard M'Carthy*, for the conſpiracy to defraud, and were convicted.

Coſlet's

Coſlet's Caſe.

CASE 101.

AT the Old Bailey, in February Seſſion 1782, *Henry Coſlet* was indicted for ſtealing a quantity of currants, the property of *John Parker*.

What ſhall be conſidered a ſufficient *carrying away* to conſtitute the offence of larceny. Bro. Cor. 45, 48, 137, 160. Kely, 24. 1 Hale, 504. 1 Hawk. 134.

The proſecutor was the proprietor of the Uxbridge waggon, in the forepart of which the goods laid in the indictment were packed. The priſoner got into the waggon, and after groping about on his hands and knees, laid hold of this parcel of currants, and had got near the tail of the waggon with them when he was apprehended. The parcel was afterwards found near the middle part of the waggon.

The Jury found the priſoner guilty; but as he had not carried the goods out of the waggon, the Court (*a*) doubted, Whether this was a ſufficient *aſportation* to conſtitute the crime of larceny. The judgment was accordingly reſpited, and the caſe reſerved for the conſideration of the twelve Judges; and they were unanimouſly of opinion, That as

(*a*) Mr. *Baron Perryn*, before whom the priſoner was tried, mentioned a caſe which had recently been reſerved by Mr. Juſtice *Nares* for the conſideration of the twelve Judges.—Somewhere in the Acton road, a perſon got into a waggon, with intent to ſteal a parcel of goods, which lay as a pocket of hops would, at its length. He had raiſed it up, and placed it upon its end, in a perpendicular poſture; but he had not removed it from the place where it originally lay in the waggon. He had cut the package open with a knife, and was proceeding to take out the goods which it contained; but before he had taken out the goods he was detected: and the Judges were unanimouſly of opinion, That as he had not removed the bale from the *ſpot* on which it laid, there was not a ſufficient *taking*, or carrying away to conſtitute a larceny; and the priſoner was diſcharged. See Lapier's caſe, poſt, where both theſe caſes are cited.

the

Cos-LET'S CASE.

the priſoner had removed the property from the *ſpot* where it was originally placed, and the Jury had found that he had ſo removed it with intent to ſteal, it was a ſufficient *taking and carrying away* to conſtitute the offence.

CASE 102.

Richard Carroll's Caſe.

A garret in the occupation of workſmen, and rented with a ſleeping-room, by the week, is the manſion of the lodger, if the landlord does not live under the ſame roof.

AT the Old Bailey, in February Seſſion 1782, *Richard Carroll*, a young lad ſtone-blind, was convicted before Mr. *Serjeant Adair*, *Recorder*, of breaking and entering the dwelling-houſe of *John Jordan*, in the night-time with intent to ſteal.

The houſe in which the offence was committed, belonged to one *Naſh*, who did not live in any part of it himſelf, but let the whole of it out in ſeparate lodgings, from week to week. *John Jordan* had two apartments in the houſe, *viz.* a ſleeping-room up one pair of ſtairs, and a working-ſhop in the garret, which he rented by the week, as tenant at will to *Naſh*. This working-ſhop was the room broke open by the priſoner.

The Jury found the priſoner guilty; but the caſe was referred to the conſideration of the Judges upon the queſtion, Whether, under the circumſtances above mentioned, the indictment could be ſupported for burglary in the dwelling-houſe of *John Jordan?*

On the firſt day of Eaſter Term 1782, the twelve Judges aſſembled at *Lord Mansfield's* chambers; and they were unanimouſly of opinion,

on,

on, (*a*) That as *Naſh*, the owner of the houſe, did not inhabit any part of it, the indictment had properly charged it to be the dwelling-houſe of *John Jordan*, the lodger; and they ſaid the caſe of *the King v. Rogers* was preciſely in point with the preſent caſe. CARROLL'S CASE.

(*a*) See the caſe of *William Trapſhaw*, where Mr. Juſtice *Gould*, in delivering the opinion of the Judges, ſays, "That he had ſeen "a memorandum by Mr. Juſtice *Buller*, in which he takes no-"tice, that only *ten* of the *twelve* Judges united in their opinion "on this caſe, and that he and Mr. Baron *Eyre* differed" Poſt.

The King *againſt* John Patch.

CASE 105.

AT the Old Bailey, in February Seſſion 1782, *John Patch* was indicted before Mr. Juſtice *Gould*, preſent Mr. Baron *Perryn*, and Mr. Juſtice *Buller*, for ſtealing a ſilver watch, a ſteel chain, a gold ſeal, two pieces of foreign coin, and ſeven ſhillings in money, the property of *Jeremiah Bumſtead*.

To obtain property from another by the practice of *ring-dropping* is felony, if the Jury find it was obtained under a preconceived deſign to ſteal it. Kely, 24, 81. Shower, 50, 57. 1 Hale, 507. 3 Inſt. 108. 1 Sid. 254. Raym. 256. 1 Hawk P. C. 136, 137.

The proſecutor depoſed, that the priſoner and two other perſons who made their eſcape, had joined company with him in the ſtreet, and after walking a ſhort ſpace one of them ſtooped down and picked up a purſe, which upon inſpection contained a ring, and a receipt for 147l. purporting to be the receipt of a jeweller for "a rich brilliant "diamond ring." The priſoner propoſed that they ſhould go into ſome public-houſe, to conſider in what manner their reſpective proportions of this prize were to be divided, and accordingly they all four of them went into an ale-houſe on Saffron-hill. Various modes of diſtribution were ſuggeſted: at length the priſoner aſked the proſecutor, if it would be agreeable to him to take the ring

PETCH'S CASE.

ring into his own poſſeſſion, and to depoſit his money and his watch as a ſecurity to return it upon receiving his portion of its value. The proſecutor aſſented to this propoſal; and ſigned a written agreement, "That when the priſoner, or either "of the other two men returned the watch and "money, and *ſeventy pounds*, he would re-deli-"ver to them the purſe and the ring." The proſecutor accordingly laid the watch and money mentioned in the indictment upon the table, and received the ring. The priſoner beckoned the proſecutor out of the room, upon a pretence of ſpeaking to him in private; and during this interval the other two men marched off with the property.—The abrupt manner in which they went away ſuggeſted to the proſecutor that he had been defrauded, and he ſecured the priſoner. The ring was valued at ten ſhillings.

It was objected by the priſoner's Counſel, that as the proſecutor had parted voluntarily with the *poſſeſſion* of his property, it was a fraud only, and not a felony; but the Court, upon the authority of *the King v. Pares*, referred it the Jury to conſider whether the whole tranſaction was not an artful and preconcerted ſcheme in the three men, feloniouſly to obtain the proſecutor's watch and money.

Ante.

The Jury found the priſoner guilty; and he was ſentenced to raiſe gravel three years on the river Thames.

Gribble's

Gribble's Caſe.

CASE 104.

AT the Old Bailey, February Seſſion 1782, an indictment on the ſtatute 5 Eliz. c. 4. was preferred, charging the priſoner with having ſtolen a watch from *Thomas Sheridan*, privately from his perſon and without his knowledge.

The offence of privately ſtealing from the perſon, cannot be committed on a perſon who has rendered himſelf ſenſeleſs by intoxication. *Sed quære.*

The proſecutor had been drinking at a public-houſe with the priſoner, and being both of them much intoxicated, they went together to the priſoner's lodgings, where the proſecutor fell aſleep, and while he was aſleep the priſoner ſtole his watch.

The Court ruled this not to be ſuch a ſtealing privately as would ouſt the offender from the benefit of clergy, within the meaning of the legiſlature; and mentioned the following caſe as having been decided by the Judges:—A perſon who had become intoxicated at Vauxhall gardens, fell faſt aſleep in his way home, in one of the watch-houſes or niches on Weſtminſter-bridge. A waiter alſo from Vauxhall paſſing that way ſtole the buckles out of his ſhoes without waking him; and the Judges were of opinion, That the ſtatute was intended to protect the property which perſons by proper vigilance and caution ſhould not be enabled to ſecure; but that it did not extend to perſons who by intoxication had expoſed themſelves to the dangers of depredation, by deſtroying thoſe faculties of the mind by the exertion of which the larceny might probably be prevented.

Vide Rex v. Thompſon, poſt.

2 Hawk. P. C. 490.

GRIBBLE'S CASE.

The Jury found the priſoner guilty of ſtealing; but not privately from the perſon (*a*).

(*a*) At the O. B. Dec. Seſſ. 1778, *Mary Reading* and *Mary Jones* were tried for privately ſtealing from the perſon. It appeared in evidence, that the proſecutor, a hackney-coachman, while he was waiting for his fare at the door of a brothel in Covent-garden, had laid himſelf down in the bottom of his coach, with the door open and fallen aſleep; and that the priſoners had rifled his pockets without waking him. The Court informed the Jury, that it was the opinion of the late Mr. Juſtice *Aſton*, in a ſimilar caſe, and with whoſe opinion they perfectly agreed, that this was not a caſe within the ſpirit of the Act of Parliament; for that it was evident from the preamble of it, that it was intended only for the protection of perſons in public meetings, and places of proper reſort. *Sed vide Thompſon's Caſe, poſt.*

CASE 105.

Ann Guy's Caſe.

Money is not within the meaning of the words *goods or chattels.*

AT the Old Bailey, in April Seſſion 1782, *Ann Guy* was indicted as an acceſſary after the fact, in receiving *two guineas*, ſhe well knowing them to have been ſtolen.

Mills' caſe, ante, 48. Foſter, 73, 378.

Mr. *Baron Eyre* ſaid he was clearly of opinion, That there cannot be an acceſſary after the fact for receiving *money*. The ſtatutes of 3 Will. and Mary, c. 9. ſ. 4. and 5 Ann. c. 31. ſ. 5. ſay, that whoever ſhall buy or receive any *goods or chattels* that ſhall be feloniouſly ſtolen, knowing the ſame to be ſtolen, ſhall be deemed an acceſſary after the fact to ſuch felony; but *money* cannot be well conſidered as *goods or chattels*, within the meaning of theſe Acts (*a*).

The priſoner was acquitted.

(*a*) See Morris' Caſe, poſt. where this point was determined accordingly by all the Judges, *abſente* Mr. Baron Eyre.

The

The King *againſt* Pedley. CASE 106.

FIRST CASE.

THIS was a Special Verdict found at the Gaol Delivery for Briſtol in 1782, on the trial of an indictment againſt *William Pedley*, for Arſon; and argued in the Court of King's Bench, in *Trinity Term*, 22 Geo. 3.

A tenant from year to year is not guilty of Arſon by burning the houſe of which he is in poſſeſſion; but if by firing his own houſe he thereby burn the houſe of another, he is guilty of the crime.

The Indictment contained ſeventeen counts, in which the offence was reſpectively laid to be committed, *1ſt*, againſt the common law; *2dly*, againſt the ſtatute 9 Geo. 1. c. 22. Several of the counts diſtinctly charged, That the priſoner did *ſet fire to*, and *burn* the houſe of *Freeman*, *Lucy*, and *Giles*. Other counts charged, That he *ſet fire* to his own houſe, *with intent* to *burn* the houſe of *Freeman*, *Lucy*, and *Giles*, near to the priſoner's dwelling-houſe, by reaſon whereof the ſaid houſe of *Freeman*, *Lucy*, and *Giles* was ſet on fire and burned. The neighbouring houſe was alſo laid to be the houſe, *1ſt*, of *Francis Parry*; *2dly*, of *Richard Coombe*; *3dly*, of *the Mayor of Briſtol*.—The priſoner was alſo charged in ſome of the counts with burning his own houſe. The ſeveral *houſes* were reſpectively termed *dwelling-houſes*; and the offence laid throughout to have been committed feloniouſly, wilfully, and maliciouſly.

The Verdict.—"All the houſes mentioned in "the indictment were the freehold and inheri- "tance of the Mayor of Briſtol, who had de- "miſed that in which the priſoner dwelt to *Free-* "*man*, *Lucy*, and *Giles*, for the term of ninety-

PEDLEY'S CASE. " nine years, determinable with three lives.— " *Freeman*, *Lucy*, and *Giles* had demiſed the ſaid " houſe to the priſoner for ſeven years, part of " which term was ſubſiſting. The Mayor of " Briſtol had alſo demiſed three other meſſuages " adjoining to that in the poſſeſſion of the priſoner " to *Richard Coombe* for a term of ninety-nine " years, determinable as aforeſaid; and *Richard* " *Coombe* had again demiſed the ſaid three meſ- " ſuages to *Francis Parry* for a year, and ſo from " year to year, ſo long, *&c.* On the 29th of " September, 1780, *Francis Parry* demiſed one " of theſe three meſſuages to *John Landy* for three " months, who entered and continued in poſſeſ- " ſion *until* and *upon* the 8th of December, 1780; " and this is the houſe that is alledged in the in- " dictment to be the houſe of *Francis Parry*.— " The *priſoner* and *John Landy* being thus in " poſſeſſion of their reſpective houſes, ſo demiſed " as aforeſaid, the priſoner, on the 6th of De- " cember, 1780, unlawfully, wilfully, and mali- " ciouſly ſet fire to, and ſet on fire the ſaid houſe " in *his* poſſeſſion, with intent wilfully and mali- " ciouſly to burn the ſame, and did thereby burn " and deſtroy great part of the ſame; and by " means thereof the ſaid fire was communicated " to the houſe in the occupation of *John Landy*, " and burned and conſumed part thereof. But " whether upon the whole of theſe facts the pri- " ſoner is guilty of the offences charged in the " indictment, the Jury ſubmit to the Court."

Mr. *Lawrance*, as Counſel for the Crown, ſaid, that three queſtions *might* be made from the facts diſcloſed by the Special Verdict. *Firſt*, Whether the priſoner was not guilty of Arſon at common law in burning his own houſe? *Secondly*, Whether

Whether it was not an offence within the meaning of the ſtatute 9 Geo. 1. c. 22.? But he acknowledged that, notwithſtanding the opinion of a great writer upon Crown Law to the contrary, he was apprehenſive that the doctrine in *Holmes's Caſe*, *Cro. Car.* 533. upon this ſubject had been too firmly and recently eſtabliſhed, for any arguments he could uſe *ab inconvenienti* to remove. In *Breeme*'s *Caſe* (*a*), in the year 1780, it was determined by nine of the JUDGES, that a man is not guilty of felony in ſetting fire to his own houſe; and in *Spalding*'s *Caſe* (*b*), about the ſame time, it was determined with equal unanimity, that the ſtatute 9 Geo. 1. c. 22. had created no new offence. PEDLEY'S CASE.

(*a*) Ante.

(*b*) Ante.

Mr. *Lawrance* therefore confined his arguments to the *third queſtion*, "Whether the priſoner's "having burnt his neighbour's houſe by means "of burning his own, was not an offence with-"in the legal idea of ARSON?" and contended, that where a man doth an act *malum in ſe*, wilfully and deliberately, and ſuch act occaſions a miſchief which if it had been immediately done would have been felony, the act which produced ſuch miſchief ſhall alſo be conſidered as felonious. "If *A.* tenant for years of a houſe, ſets fire to "it, intending to burn the houſe of *B.* and "thereby he does burn the houſe of *B.* this is "felony; but if he doth not burn the houſe of "*B.* it is only a great miſdemeanor, but no fe-"lony." 1 *Hale*, *P. C.* 568. *Dalton*, *ch.* 158. *p.* 506. *Edit.* 1727. "It ſeemeth, ſays *Dalton*, "*ch.* 105. *p.* 270. That if a man unlawfully "ſhoot in a hand-gun, and the fire thereof ſets "another man's houſe on fire, and burn it "down, it is felony (*c*)." 3 *Inſt.* 67. *Kely*, 117. 1 *Hawk.*

(*c*) See vide 1 Hale, 569. contra.

PEDLEY'S CASE. 1 *Hawk. ch.* 106. *ſ.* 5. 4 *State Trials*, 222. Caſes of murder conſtantly proceed upon this principle; and wherever death follows an act which is *malum in ſe*, and the event was probable from the act, the actor is anſwerable in *felony* for the conſequences; for Mr. Juſtice *Foſter* ſays, it is no excuſe for the aggreſſor to ſay, that he did not intend all that follows.

Lord *Mansfield*. The law is now eſtabliſhed and ſettled, that if a tenant ſet fire to the houſe of his landlord, he is not guilty of Arſon. The legal definition of this crime is burning the houſe of *another*; and it was lately determined in *Brecnic*'s *Caſe*, by the unanimous opinion of nine JUDGES, that it is not felony to burn a houſe of which the offender is in *poſſeſſion* by virtue of a *leaſe for years*; and this was alſo the title in *Holmes*'s *Caſe*, which is now confirmed to be good law. I very much lament that the law is ſo ſettled. If it had been a new queſtion, I ſhould not have been *ſingly* of a contrary opinion. The bias of my mind is in favour of Mr. Juſtice *Foſter*'s opinion, that "the houſe might with "ſtrict legal propriety have been conſidered as "the houſe of the landlord;" and although he truly ſays, "that *both* landlord and tenant have "a property in the houſe, the one temporary "and limited, the other abſolute and perpe-"tual;" yet to decide, that he who has ſo trifling an intereſt in a houſe as a year or leſs ſhould not be guilty of Arſon by burning it, would, in my conception, require great deliberation. But as to that point of the preſent caſe, it is firmly ſettled, and the legiſlature alone can alter it. As to the third point, there is no doubt but that the propoſitions laid down are grounded upon the

The caſe of Eliz. Harris, Foſt. 115, 116.

the true principles of law when applied to certain caſes; but whether the preſent is a caſe in which they ought to prevail, it ſeems immaterial to enquire; for the crime of Arſon, as I have ſaid before, is an offence committed againſt *the poſſeſſion of another;* and *Pedley* has not been tried for burning the houſe of which *John Landy* was in *poſſeſſion*, becauſe, though in fact it was the houſe burned, the indictment has ſtated it to be in the poſſeſſion of *Richard Coombe*. PEDLEY'S CASE.

Judgment was given for the priſoner, but he was remanded.

Henry Lavell's Caſe. CASE 107.

AT the Old Bailey, in September Seſſion 1782, *Henry Lavell* was indicted on the ſtatute 7 Geo. 2. c. 22. for forging an order for the payment of money, purporting to be an order for 10l. 10s. directed to DRUMMOND *and Co. Charing-Croſs*, by the name of Meſſ. *Drummond, Charing-Croſs*, by which Meſſ. *Drummond and Co.* of *Charing-Croſs* were required to pay the bearer the ſaid ſum; and which ſaid order was as follows: In an indictment of forgery, a deſcription to a common intent of the perſon intended to be defrauded, is ſufficient.

"Auguſt 25, 1782.

"Meſſ. DRUMMOND, *Charing-Croſs*,

"Pleaſe to pay the bearer, or order, on demand, Ten Pounds Ten Shillings, and place the ſame to account of me,

"HENRY HARVEY ASTON."

There

LAVELL'S CASE.

There was a ſecond count for uttering the ſaid order, knowing it to be forged; and theſe offences were reſpectively charged to have been committed, *firſt*, with an intention to defraud *H. H. Aſton;* and, *ſecondly*, *Meſſ. Drummond and Co.*

The priſoner was convicted upon very clear evidence; but it was moved, in arreſt of judgment, that the names of Mr. *Drummond*'s partners ſhould have been ſeverally ſet forth in the indictment; and that the firm "*Meſſ. Drummond and Co.*" was not ſuch a certain deſcription of perſons as the law in this caſe required. Upon this motion the judgment was reſpited, and the point of law ſubmitted to the conſideration of the Judges.

Mr. *Baron Hotham*, in the December Seſſion following, delivered the opinion of the Judges to this effect: The twelve Judges, in deciding upon this queſtion, have conſidered the import and operation of the words "*Meſſ. Drummond* "*and Co. Charing-Croſs.*" The rule of law upon this ſubject is, that every averment neceſſary in an indictment muſt be ſtated with ſuch a degree of certainty as will enable the party to learn the general nature of the crime he is accuſed of, and who are the accuſers againſt whom he is to defend himſelf. If therefore, in the preſent caſe, the deſignation of perſon is expreſſed with ſufficient certainty for this purpoſe, without calling in aid the words "*and Co.*" in which words the uncertainty complained of is ſuppoſed to reſide, thoſe words may be rejected as ſuper-abundant and unneceſſary, and the indictment will be good without them. But if they are eſſential to the certainty of deſcription, and cannot be rejected as

as ſurpluſage; and the words "*Meſſ. Drum-*
"*mond and Co. Charing-Croſs,*" when taken together, are ſo ſenſeleſs and unintelligible as not to import a certain deſcription of perſons; then the indictment will be bad. On the firſt point the Judges are of opinion, That as "*Mr.*
"*Drummond, Charing-Croſs,*" would have been ſufficiently deſcriptive of the perſon intended to be defrauded, the words "*and Co.*" may be rejected as ſurpluſage, without vitiating the indictment. They are alſo of opinion, That without expunging theſe words, the ſentence "*Meſſ.*
"*Drummond and Co. Charing-Croſs,*" is ſufficiently intelligible to convey with legal certainty, a notification of the party intended to be defrauded; and that it is not neceſſary to deſcribe the party meant with more particularity; for if any perſon can be intended from the words, who that perſon is, and whether he was the meditated object of the fraud, are matters for the conſideration of the Jury. The verdict, in the preſent caſe, has eſtabliſhed the fact, that the priſoner intended to defraud "*Meſſ. Drummond and*
"*Co. of Charing-Croſs;*" and therefore on all theſe grounds the Judges are unanimouſly of opinion, That the indictment is good, and of courſe that the judgment ought not to be arreſted.

The priſoner accordingly received ſentence of death; but he afterwards received a conditional pardon.

William

CASE 108.

William Baſs's Caſe.

If a ſervant, who receives goods from his maſter to deliver to a cuſtomer, ſells them and converts the money to his own uſe, he is guilty of felony; for the poſſeſſion is not out of the maſter by ſuch delivery.

AT the Old Bailey, in May Seſſion 1782, *William Baſs* was convicted of ſtealing a quantity of goods, the property of *John Gatfee*.

The priſoner was ſervant to the proſecutor, a gauze-weaver in Biſhopſgate-Street. On the day laid in the indictment he was ſent with a package of goods from his maſter's houſe, with directions to deliver them to a cuſtomer at a particular place. In his way he met two men who invited him into a public houſe to drink, and then perſuaded him to open the package and ſell the goods; which he accordingly did, and received eight guineas of the produce to his own uſe.

It was referred to the conſideration of the twelve Judges, Whether, from the above facts, the priſoner was guilty of a felonious taking?

See the caſe of John Aſhill in April Seſſion, 1782.

Mr. Baron *Hotham* in December Seſſion 1782, delivered it as the unanimous opinion of all the Judges, That the conviction was proper; for the priſoner ſtanding in the relation of a ſervant, the *poſſeſſion* of the goods muſt be conſidered as remaining in the maſter until and at the time of the unlawful converſion of them by the priſoner. The maſter was to receive the money for them from the cuſtomer, and he could at any time have countermanded the delivery of them. The priſoner therefore, by breaking open the package, tortiouſly took them from the *poſſeſſion* of the owner, and having by the ſale converted them *animo furandi*

randi to his own uſe, the taking is felonious. Many caſes of this kind have occurred, and they have all of them been determined to be felony.

BASS'S CASE.

White's Caſe.

CASE 109.

AT the Old Bailey, February Seſſion 1783, the priſoner was indicted for burglary in the dwelling-houſe of *John Snoxall*, and ſtealing therein goods, the property of *Ann Lock*.

The name of the owner of the houſe is eſſential in an indictment for *burglary*, and for *ſtealing in the dwelling-houſe*.

It appeared that it was not the dwelling-houſe of *John Snoxall*; and it was therefore held (*a*), that the priſoner could not be found guilty either of the burglary, or of ſtealing to the amount of forty ſhillings in the dwelling-houſe, under the 12 Ann. c. 7. for it is eſſential in both caſes to ſtate in the indictment, *the name* of the perſon in whoſe houſe the offences are committed (*b*).

(*a*) By Mr. Juſtice *Buller*, and Mr. Juſtice *Gould*.

(*b*) In October, 1785, *William Woodward* was indicted for ſtealing in the houſe of *Sarah Lunns*. It appeared in evidence, that her name was *Sarah London*. Mr. Serjeant *Adair*, Recorder, held the variance fatal to the capital part of the indictment.

Patrick

CASE 110.

Patrick and Pepper's Caſe.

A corporation muſt proſecute in their corporate name; and the addition of ſuch name as a deſcription of the *perſons* of which the corporation is compoſed, is not ſufficient in an indictment.

AT the Old Bailey, in February Seſſion 1783, *Aaron Patrick* and *John Pepper* were indicted before Mr. Juſtice *Buller*, preſent Mr. Baron *Perryn*, on the ſtatute 6 Geo. 3. c. 48. for cutting down trees in the night-time, growing in Enfield Chaſe.

The firſt count in the indictment laid the property as "belonging to *Joſeph Brown*, *George* "*Cook*, and *William Sedcole*, then being the "church-wardens of Enfield aforeſaid, &c. they "the ſaid *Joſeph Brown*, *George Cook*, and *Wil*- "*liam Sedcole*, then being the owners of the ſaid "trees," &c. The ſecond count laid the property to belong to the ſame perſons by name, "they the ſaid *Joſeph Brown*, *George Cook*, and "*William Sedcole*, then being the church-war- "dens of the pariſh-church of Enfield, in the "county of Middleſex."

By the ſtatute 17 Geo. 3. c. 17. for dividing Enfield Chaſe, a certain allotment of the land is veſted in the church-wardens of Enfield for the time being, and their ſucceſſors for ever, in truſt for the owners and proprietors of freehold and copyhold meſſuages, lands and tenements, within the pariſh, who were intitled to a right of common, &c. within the Chaſe. And by ſect. 115. the church-wardens are incorporated by the name of "*the church-wardens of the pariſh-church of* "*Enfield, in the county of Middleſex.*"

Mr.

Mr. *Peckham* and Mr. *Mingay*, Counſel for the priſoners, ſubmitted to the Court, that a conviction could not be ſuſtained upon this indictment; for that inſtead of laying the trees to be the property of the corporation, by their public name, it had laid them to be the property of the individual members compoſing ſuch corporation, by their private names.

Mr. *Silveſter* and Mr. *Fielding*, for the Crown, contended, that as the Act of Parliament had veſted the property in the church-wardens for *the time being*, it was neceſſary for the ſake of certainty to mention their names: but admitting the inſertion of their names to be unneceſſary, and ſuppoſing it expunged as ſuperabundant, the indictment would ſtill remain good; for that the firſt count would then lay the property as belonging to "*the church-wardens of Enfield*;" and the ſecond count, purſuing the words of the ſtatute, would lay it technically as belonging to "*the church-wardens of the pariſh-church of Enfield, in the county of Middleſex;*" which is the very name by which the legiſlature has deſcribed their corporate capacity.

The Court held the objection to be fatal. The indictment would have been clearly right, if the firſt clauſe of the Act of Parliament which veſts the property in the church-wardens for the time being had ſtood ſingle. But the clauſe which gives the church-wardens a corporate capacity, and a corporate name, puts an end to the queſtion; for where any deſcription of men are directed by law to act in a corporate capacity, their natural and individual capacity as to all matters reſpecting the ſubject of their corporation, is totally extinct.

PATRICK and PEPPER'S CASE.

extinct. The preſent indictment deſcribes the trees to be the property of certain *individuals*, by their names; but the Act of Parliament ſhews the property to be in the *corporation*. If an action was brought in the private names of the preſent proſecutors, for any matter relating to their public capacity, they muſt unavoidably be nonſuited; and *à fortiori*, it muſt be erroneous in a criminal proſecution. But it is ſaid, that the private names may be expunged as ſurpluſage. In the firſt count, ſuppoſing them expunged, the remaining deſcription would be, "the *church-wardens of* "*Enfield*," which is not the name of the corporation; and therefore that count would ſtill be wrong. In the ſecond count, it is true, the corporate name is uſed; but the property is not laid to be in the corporation of that name, it is laid to be in the private perſons, and the public name is uſed merely as a deſcription of thoſe perſons. The priſoners muſt therefore be diſcharged on this indictment.

See Sherrington and Buckley's Caſe, poſtea, O. B. February Seſſion, 1789.

CASE III.

The King *againſt* Hawkeſwood.

In an indictment for forging a bill of exchange, the bill may be given in evidence, altho' it is not ſtamped purſuant to 23 Geo. 3. c. 49.

AT Worceſter Lent Aſſize 1783, the priſoner was indicted for forging a negotiable bill of exchange, purporting to be drawn by one *Prattington* on *Sir Robert Herrics and Co.* AND ALSO, for forging two indorſements on the ſame; one in the firm of *Cox and Devey*, the other in the name of *John Hadur*. There were alſo the uſual counts for uttering it, knowing it to be forged.

The fact of its being a forgery, and that the priſoner had negociated it with a complete knowledge of that fact, were very clearly proved; but upon

upon producing the bill in evidence, it appeared not to be ſtamped purſuant to the ſtatutes of 23 Geo. 3. c. 49. ſ. 14. and 23 Geo. 3. c. 58. ſ. 11. which enact, "That no bill of exchange, &c. "not ſtamped as thoſe Acts direct, ſhall be plead-"ed and given in evidence in *any* Court, or ad-"mitted in *any* Court to be good, or available in "law or equity."

HAWKES-WOOD'S CASE.

2 Term Rep. 666.

Mr. *Baldwyn*, the priſoner's Counſel, ſubmitted to the Court, that the inſtrument in queſtion, even ſuppoſing it to be genuine, was not a lawful *bill of exchange*, but a piece of waſte paper, incapable of becoming the ſubject of either a fraud or a felony; that the party who took it, muſt at the time have known that it was not a legal *bill of exchange*, or he muſt have been groſsly negligent, for the defect is viſible on the face of it.

Mr. *Juſtice Buller*, who tried the priſoner, held, that the Stamp Acts above-mentioned being revenue laws, and not purporting to alter the crime of forgery, could not affect the preſent queſtion; and the Jury found the priſoner guilty, but being a new point he reſpited the judgment, and reſerved the caſe for the conſideration of the Judges.

In Eaſter Term, 1783, the Judges over-ruled the objection, and determined that the conviction was right (*a*).

(*a*) In January Seſſion, 1784, *John Lee* was indicted for forging a bill of exchange, purporting to be made by *Lord Townſhend*, Maſter-General of the Ordnance; and an objection was taken againſt producing it in evidence, becauſe it was not ſtamped: but upon the authority of this deciſion, the objection was over-ruled, and the priſoner was condemned and executed.

Warickſhall's

CASE 112.

Warickſhall's Caſe.

Confeſſions obtained in conſequence of *promiſes* or *threats* cannot be given in evidence; but any *facts*, tho' reſulting from ſuch inadmiſſible confeſſion, may be received.

AT the Old Bailey, in April Seſſion, 1783, *Thomas Littlepage* was indicted before Mr. *Juſtice Nares*, preſent Mr. *Baron Eyre*, for grand larceny; and the ſame indictment charged *Jane Warickſhall*, as an acceſſary after the fact, with receiving the property knowing it to have been ſtolen.

The acceſſary had made a full confeſſion of her guilt; and in conſequence of it the property had been found in her lodgings, concealed between the ſackings of her bed. The confeſſion, however, having been obtained by promiſes of favour, the Court refuſed to admit it in evidence againſt her; and it was contended by her Counſel, that as the fact of finding the ſtolen property in her cuſtody had been obtained through the means of an *inadmiſſible confeſſion*, the proof of that fact ought alſo to be rejected; for otherwiſe the faith which the proſecutor had pledged would be violated, and the priſoner made the deluded inſtrument of her own conviction.

The Court. It is a miſtaken notion, that the evidence of *confeſſions and facts* which have been obtained from priſoners by *promiſes or threats*, is to be rejected from a regard to public faith: no ſuch rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law. Confeſſions are received in evidence, or rejected as inadmiſſible, under a conſideration whether they are, or are not intitled to credit.

A free

A free and voluntary confeſſion is deſerving of the higheſt credit, becauſe it is preſumed to flow from the ſtrongeſt ſenſe of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confeſſion forced from the mind by the flattery of hope, or by the torture of fear, comes in ſo queſtionable a ſhape when it is to be conſidered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected. This principle reſpecting confeſſions, has no application whatever as to the admiſſion or rejection of facts, whether the knowledge of them is obtained in conſequence of an extracted confeſſion, or whether it ariſes from any other ſource; for a fact, if it exiſts at all, muſt exiſt invariably in the ſame manner, whether the confeſſion from which it is derived be in other reſpects true or falſe. Facts thus obtained, however, muſt be fully and ſatisfactorily proved, without calling in the aid of any part of the confeſſion from which they may have been derived; and the impoſſibility of admitting any part of the confeſſion as a proof of the fact, clearly ſhews that the fact may be admitted on other evidence: for as no part of an improper confeſſion can be heard, it can never be legally known whether the fact was derived through the means of ſuch confeſſion or not; and the conſequences to public juſtice would be dangerous indeed; for if men were enabled to regain ſtolen property, and the evidence of attendant facts were to be ſuppreſſed, becauſe they had regained it by means of an improper confeſſion, it would be holding out an opportunity to compound felonies. The rules of evidence which reſpect the admiſſion of facts, and thoſe which prevail with reſpect to the rejection of parole declarations or confeſſions,

WARICK-SHALL'S CASE.

WARICK SHALL'S CASE.

are distinct and independent of each other. It is true, that many able Judges have conceived, that it would be an exceeding hard case, that a man whose life is at stake having been lulled into a notion of security by promises of favour, and in consequence of those promises has been induced to make a confession by the means of which the property is found, should afterwards find that the confession with regard to the property found is to operate against him. But this subject has more than once undergone the solemn consideration of the twelve Judges; and a majority of them were clearly of opinion, That although confessions improperly obtained cannot be received in evidence, yet that any *acts* done afterwards might be given in evidence, notwithstanding they were done in consequence of such confession *(a)*.

(*a*) In February Session 1784, *Dorothy Money* was tried on the statute 10 and 11 Will. 3. c. 23. for shop-lifting, and a confession had been made by her, and goods found in consequence of it, as in the above case. Mr *Justice Buller*, present Mr. *Baron Perryn* who agreed, said, "Whatever *acts* are done, are evidence; but "if those acts are not sufficient to make out the charge against the "prisoner, the conversation or confession of the prisoner cannot be "received, so as to couple it with those acts, in order to make out "the subject matter of proof. A prisoner was tried before me, "(Mr. *Justice Buller*) where the evidence was just as it is here. "I stopped all the witnesses when they came to the confession. "The prisoner was acquitted. There were two learned Judges "on the bench who told me, that although what the prisoner said "was not evidence, yet that any *facts* arising afterwards must be "received. This point, though it did not affect the prisoner at the "bar, was stated to *all the Judges*; and the line drawn was, that "although confessions improperly obtained cannot be received in "evidence, yet that the acts done afterwards may be given in evi-"dence, though they were done in consequence of the confession." See also *Lockhart's Case*, *postea*, *June Sess.* 1785.

Jackson

Jackſon and Randall's Caſe.

CASE 113.

AT the Old Bailey, in April Seſſion 1783, *William Jackſon* and *Thomas Randall* were indicted on the ſtatute of 7 Geo. 2. c. 22. before *James Adair, Eſq;* Recorder; and the Jury found the priſoners guilty: but a doubt ariſing, whether the indictment had ſufficiently deſcribed the offence, the judgment was reſpited, for the purpoſe of ſubmitting the caſe to the conſideration of the Judges.

An indictment on the 7 Geo. 2. c. 22. for aſſaulting with intent to rob, muſt ſtate that the aſſault was made with an *offenſive weapon*, and that a *demand* was made of money or goods.

The ſtatute enacts, "That if any perſon or "perſons, with any offenſive weapon or inſtru-"ment, unlawfully and maliciouſly ſhall aſſault, "*or* ſhall by menaces, or in or by any forcible "or violent manner, demand any money, goods, "or chattels, of or from any other perſon or "perſons, with a felonious intent to rob or "commit robbery upon ſuch perſon or perſons, "the offender ſhall be liable to be tranſported "for ſeven years."

The indictment ſtated, that the priſoner on ſuch a day, &c. "in the King's highway, with "force and arms, in and upon one *Andrew* "*Gilleſpie*, in the peace of God and our Lord "the King then and there being, unlawfully "and maliciouſly did make an aſſault, and him "the ſaid *Andrew Gilleſpie* unlawfully and mali-"ciouſly did menace, then and there threaten-"ing to blow his brains out; with intent his "monies felonioufly from his perſon to take, "ſteal, and carry away, againſt the form of the "ſtatute," &c.

JACKSON and RANDALL'S CASE.

The queſtion was, Whether an indictment under this ſtatute, in deſcribing the manner in which the offence was committed, muſt not neceſſarily ſtate, either that the aſſault was made with an offenſive weapon, with a felonious intent to rob, &c. or, that by menaces, or in or by a forcible or violent manner, a demand of monies or goods was made, with a felonious intent, &c. the words of the Act being throughout in the disjunctive.

In the July Seſſion following the priſoners were put to the bar, and informed by *Mr. Recorder*, that the Court had taken the caſe into their conſideration; and that it was the opinion of the Judges, That the indictment was inſufficient, in not having ſtated that the aſſault was made with an offenſive weapon, or, that any demand was made of money or goods; and therefore no judgment could be given on it; for that it is neceſſary in point of law, that an indictment on any particular Act of Parliament ſhould ſtrictly follow the words of the Act; and that the Court cannot ſupply from any other circumſtances a ſufficient deſcription of the offence.

CASE 114.

The King *againſt* John Davis.

Where a ſtatute makes an offence felony, puniſhable with death without clergy, and a ſubſequent ſtatute inflicts a milder puniſhment on the ſame offence, the latter ſtatute is a *virtual* repeal of ſo much of the former ſtatute as relates to the offence.

AT Hertford Summer Aſſize 1783, *John Davis* was indicted on the BLACK ACT, before Mr. Juſtice *Gould*, for "that he one "fallow deer, of the price of forty ſhillings, of "and belonging to *Philadelphia Lee*, widow, "then

" then and there being kept and fed in a certain " park, of and belonging to the ſaid *Philadelphia* " *Lee*, incloſed with pales, where deer had been " and then were uſually kept, unlawfully, wil- " fully, and felonioufly did hunt," &c. DAVIS'S CASE.

There were two other counts; one for *killing*, and the other for *ſtealing*, the fallow deer as aforeſaid.

The ſtatute of 9 Geo. 1. c. 22. upon which the indictment was founded, enacts, " that if " any perſon or perſons being armed with ſwords, " fire-arms, or other offenſive weapons, and hav- " ing his or their faces blacked, or being other- " wiſe diſguiſed, ſhall appear in any foreſt, chaſe, " park, paddock, or grounds, incloſed with any " wall, pale, or other fence, wherein any *deer* " have been or ſhall be uſually kept, or in any " warren or place where *hares* or *conies* have " been or ſhall be uſually kept—or ſhall un- " lawfully and wilfully hunt, wound, kill, de- " ſtroy, or ſteal any red or *fallow deer*, or un- " lawfully rob any warren or place where *conies* " or *hares* are uſually kept—or if any perſon or " perſons ſhall unlawfully and wilfully hunt, " wound, kill, deſtroy, or ſteal any red or *fallow* " *deer*, fed or kept in any places, in any of his " Majeſty's foreſts or chaſes, which are or ſhall " be incloſed with pales, rails, or other fences; " or in any park, paddock, or ground incloſed, " where deer have been or ſhall be uſually kept " —or ſhall forcibly reſcue any perſon, being " lawfully in cuſtody of any officer or other per- " ſon for any of the offences before-mentioned— " or if any perſon or perſons ſhall by gift or pro- " miſe of money, or other reward, procure any

" of

DAVIS'S CASE.

" of his Majeſty's ſubjects to join him or them " in any ſuch unlawful act; every perſon ſo of- " fending, being thereof convicted, ſhall be ad- " judged guilty of felony, and ſhall ſuffer death " as in caſes of felony without benefit of clergy."

But the learned Judge recollecting that an Act of Parliament had recently paſſed, which reduced the offence charged in the indictment to a *miſdemeanour*, he thought it improper to proceed to try the priſoner on the preſent charge for felony, until he had ſubmitted to the Judges the following queſtion:

Whether the ſtatute 9 Geo. 1. c. 22. as far as it reſpects the offences charged in the indictment, unaccompanied by the circumſtance of being *armed and diſguiſed*, is not virtually repealed by the ſtatute of 16 Geo. 3. c. 30.?

The ſtatute of 16 Geo. 3. c. 30. recites, that the ſtatutes in force for the diſcovery and puniſhment of deer-ſtealers are numerous, and many of them ineffectual; and that the good purpoſes thereby intended might be better effected, if ſuch of the ſaid ſtatutes as are found defective were repealed, and the good proviſions therein contained, together with ſuch other proviſions as may be expedient, were reduced into one Act: and then it enacts, " that if any perſon or per- " ſons ſhall courſe or hunt, or ſhall take " in any ſlip, nooſe, toil, or ſnare, or ſhall " kill, wound, or deſtroy, or ſhall ſhoot at, or " otherwiſe attempt to kill, wound, or deſtroy, " or ſhall carry away any red or *fallow deer*, in " any foreſt, chaſe, purlieu, or ancient walk, " whether incloſed or not, or in any incloſed " park,

" park, paddock, wood, or other incloſed ground, DAVIS'S CASE.
" where deer are, have been, or ſhall be uſually
" kept, without the conſent of the owner, or
" without being otherwiſe duly authoriſed; or
" ſhall be aiding, abetting or aſſiſting therein or
" thereunto; every perſon ſo offending by courſ-
" ing, hunting, ſhooting at, or otherwiſe *at-*
" *tempting* to kill, wound, or deſtroy, or by
" aiding therein or thereunto, ſhall forfeit for
" every ſuch offence the ſum of *twenty pounds*.—
" And every perſon ſo offending by killing,
" wounding, or deſtroying, or by taking in any
" ſlip, nooſe, toil, or ſnare, or by carrying
" away, or by aiding therein reſpectively, ſhall
" for every deer ſo wounded, killed, deſtroyed,
" taken, or carried away, forfeit and pay the
" ſum of *thirty pounds*.—And if the offender in
" any of the caſes aforeſaid ſhall be a keeper of,
" or perſon in any manner intruſted with the
" cuſtody or care of deer, in the foreſt, chaſe,
" purlieu, ancient walk, or incloſed park, pad-
" dock, or wood, or other incloſed place where
" the offence ſhall be committed, every ſuch of-
" fender ſhall forfeit and pay *double the penalty*
" herein before appointed to be paid by other
" offenders.—And if any perſon or perſons, af-
" ter having been convicted of any of the afore-
" ſaid offences, ſhall offend a ſecond time againſt
" this Act, by committing any of the aforeſaid
" offences; ſuch ſecond offence, whether it be
" the ſame as the firſt offence, or be any other of
" the aforeſaid offences, ſhall be deemed and ad-
" judged to be *felony*; and the perſon guilty
" thereof, being lawfully convicted upon indict-
" ment, ſhall be tranſported for the ſpace of ſe-
" ven years." The act then goes on to ſhew how Juſtices of the Peace may proceed on conviction

DAVIS'S CASE.

viction of offenders, and concludes with repealing ſuch parts of the ſeveral ſtatutes named in the margin *(a)* as relate to deer; but it is totally ſilent as to the intervening ſtatute of 9 Geo. 1. c. 22. upon which the preſent indictment was founded.

(a) 13 Rich. 2. c. 13. 19 Hen. 7. c. 17. 5 Eliz. c. 21. 3 Jac. 1. c. 13. 7 Jac. 1. c. 11. 13 Car. 2. 3 & 4 Will. & Mary, c. 23. 5 Geo. 1. c. 28. 10 Geo. 2.

On the firſt day of Michaelmas Term 1783, the twelve Judges held a conference upon this ſubject at Lord *Mansfield*'s chambers in Serjeants Inn; and they were unanimouſly of opinion, That the ſtatute of 16 Geo. 3. c. 30. amounted to a repeal of the felony of ſimply killing deer in a park incloſed; as it puniſhes the firſt offence with a pecuniary forfeiture of *twenty pounds*, and makes the ſecond offence felony *(a)*.

(a) The ſtatute of 5 Geo. 1. c. 27. inflicts a fine not exceeding 100l. and three months impriſonment on ſuch perſons as ſhall be convicted of ſeducing artificers.

The 23 Geo. 2. c. 13. inflicts a penalty of 500l. and twelve months impriſonment on the ſame offence: and *Lord Mansfield* held, that the latter ſtatute was in this reſpect a virtual repeal of the former. *Rex v. Cator*, 4 *Burr.* 2026.

Daniel

Daniel Hickman's Caſe.

CASE 115.

THE priſoner was tried before Mr. Juſtice *Buller*, at the Old Bailey, in July Seſſion 1783, for a robbery upon *John Miller*.

If a man forces another to part with his property for the ſake of preſerving his character from the imputation of having been guilty of an unnatural crime, it will amount to Robbery, altho' the party was under no apprehenſion of perſonal danger.

The proſecutor was ſervant to Mr. *Lewis*, table-decker to the Chaplains room in Saint James's Palace, and had an apartment, in which he alone ſlept, in a court called the Board of Green Cloth. The priſoner was a centinel on guard at the palace, and had been one night treated by the proſecutor with ſome bread and cheeſe and ale in this room. About a fortnight afterwards, very late in the evening of the day laid in the indictment, the priſoner, on going up ſtairs, heard ſomebody ſtepping almoſt upon his heels. On turning round he diſcovered it was the priſoner, who ſaid, "It is me." The proſecutor replied, "What brought you here at this time of "the night?" The priſoner anſwered, "I am "come for ſatisfaction; you know what paſſed "the other night; you are a Sodomite; and if "you do not give me ſatisfaction, I will go and "fetch a ſerjeant and a file of men, and take you "before a Juſtice; for I have been in the Black "Hole ever ſince I was here laſt, and I do not "value my life." The proſecutor aſked him what money he muſt have? The priſoner ſaid, "I muſt have three or four guineas." The proſecutor accordingly gave him two guineas, which was all he had, and promiſed to give him another guinea the next morning. The priſoner took the two guineas, ſaying, "Mind, I don't *de*-"*mand* any thing of you." The next morning he came again, and received the other guinea; and

HICKMAN'S CASE.

and in a few days after, upon making an application for more money upon the ſame pretence, he was apprehended. The proſecutor ſwore, that he was very much alarmed when he gave him the two guineas, and did not very well know what he did; but that he parted with his money under an idea of preſerving his character from reproach, and not from the fear of perſonal violence.

The learned Judge ſtated to the Jury the ſeveral ingredients which the law required to conſtitute the crime of robbery; and particularly, as applicable to this ſpecies of it, the determination of the Judges in the caſe of *the King and Donnally*; remarking the difference, that in *Donnally's caſe*, the proſecutor had ſworn, that he delivered his money under an apprehenſion of perſonal danger, as well as from the fear of loſing his character; but that, in the preſent caſe, the proſecutor had ſworn he parted with his money for the ſake of his character only, and not from any apprehenſion of danger to his perſon.

The Jury thought that the proſecutor parted with his money againſt his will, through a fear that his character might receive an injury from the priſoner's accuſation; and they therefore found the priſoner Guilty. But as this was only the ſecond caſe of the kind, and as ſome doubt had prevailed with reſpect to *Donnally's caſe*, becauſe he was not executed, the judgment was reſpited, and the caſe ſubmitted to the conſideration of the twelve Judges, upon the difference before-mentioned between the two caſes.

In

HICKMAN'S CASE.

In February Seſſion 1784, the priſoner was called to the bar, and Mr. Juſtice *Aſhhurſt* delivered the opinion of the Judges to the following effect:—Some doubts having been entertained as to the opinion of the twelve Judges in the caſe of *Patrick Donnally*, the learned Judge who tried the priſoner thought it proper that the preſent caſe ſhould likewiſe be referred to their conſideration. They have accordingly conferred upon it; and they are of opinion, That it does not *materially* differ from the caſe of *Donnally*, for that the true definition of Robbery is the ſtealing, or the ſtealing or taking from the perſon, or in the preſence of another, property of any amount, with ſuch a degree of *force* or *terror*, as to induce the party *unwillingly* to part with his property; and whether the terror ariſes from real or expected violence to the perſon, or from a ſenſe of injury to the character, the law makes no kind of difference; for to moſt men the idea of loſing their fame and reputation is equally, if not more terrific than the dread of perſonal injury. The principal ingredient in robbery is a man's being *forced* to part with his property; and the Judges are unanimouſly of opinion, That upon the principles of law, and the authority of former deciſions, a *threat* to accuſe a man of having committed the greateſt of all crimes, is, as in the preſent caſe, a ſufficient *force* to conſtitute the crime of robbery by putting in fear.

The priſoner received ſentence of death, and was executed.

Samue

CASE 116. ## Samuel Gaſcoigne's Caſe.

If a bailiff hand-cuff a priſoner under pretence of carrying him to priſon with greater ſafety, and by means of this violence extorts money, he is guilty of Robbery. 44 Ed. 3. pl. 14. 4 Hen. 4. pl. 3. S. P.C. 27. Kely, 43. 1 Sid. 254. 1 Hale, 507. 1 Hawk. 136.

THIS was a caſe reſerved for the opinion of the twelve Judges, by Mr. Juſtice *Nares*, at the Old Bailey, in October Seſſion 1783, upon the trial of an indictment for a highway robbery.

The proſecutrix was the wife of one *Charles Woodward*, a clock-maker. The priſoner was ſervant to the Turnkey of the New Priſon, and alſo what is called a Runner to a Rotation Office. On the day mentioned in the indictment he had a warrant given to him as a Conſtable (which he was not) to apprehend the proſecutrix for an aſſault. He accordingly took her from her houſe in *Shadwell*, and carried her before a Juſtice of the Peace, at a public-houſe in Faſt Smithfield. The Juſtice adviſed her to compromiſe the matter, and her huſband, who, attended, immediately went out to procure bail; but before he returned, the Juſtice went away. The moment the Juſtice was gone, the priſoner told the proſecutrix that he would take her to priſon. She begged, and upon her knees intreated him to wait until her huſband returned with bail; but he was inexorable, and immediately handcuffed her to another priſoner. She repeated her intreaties to the priſoner not to drag her to goal; and having a ſhilling in her hand, ſhe offered it to him to induce him to comply; but he inſtantly ſhoved her before him into a coach, and putting a handkerchief to her mouth, took the ſhilling out of her hand, ſaying, "This will "buy

" buy us three a glaſs a-piece," and ordered the coachman to drive to the New Priſon, Clerkenwell. They ſtopped at an ale-houſe in Long-lane, and each of them drank a glaſs of gin, which the priſoner paid for with the ſhilling he had taken from the proſecutrix's hand. As they drove on he told her, that if ſhe had money enough to pay for the coach ſhe ſhould not go to priſon. The man to whom ſhe was handcuffed rattled his hand againſt the ſide of her pocket, and the priſoner put his hand into her pocket, and took all the money he could find, which was three ſhillings. The proſecutrix made no complaint while they ſtopped at the ale-houſe in Long-lane; and upon their arrival at Clerkenwell, ſhe told the priſoner that he ſhould be welcome to the three ſhillings which he had taken out of her pocket, if he would let her go home to her huſband and her children; but he took her to the New Priſon, and paid the coachman eighteen-pence for coach-hire out of the money he had taken from her. GASCOIGNE'S CASE.

The Jury found, that the priſoner had a felonious intent of getting whatever money the proſecutrix might chance to have in her pocket; and that putting her into a ſtate in which ſhe was not capable of defending herſelf, by handcuffing her to another priſoner, under a pretence of carrying them more ſafely to priſon, was only a colourable means of putting his felonious intention into execution.

This caſe was referred to the conſideration of the Judges; and in February Seſſion 1784, Mr. Juſtice *Aſhhurſt* delivered it as their unanimous opinion, That as it was found by the verdict, that the

GASCOIGNE'S CASE. the priſoner had an original intention to take the money, the offence he had committed was clearly a robbery.

CASE 117.

Godfrey's Caſe.

2. If the warehouſe of a Blackwell-Hall Factor is within the meaning of 10 and 11 Will. 3. c. 23.

OLD-BAILEY, December Seſſion 1783.—This was an indictment on the ſtatute 10 and 11 Will. 3. c. 23. for ſtealing a piece of woollen cloth, the property of *Edward Shepherd*, privately in his warehouſe.

See Barrington on the Statutes, p. 487. and Mr. Dodſon's Preface to Foſter's Reports, x and xi.

The proſecutor was a Blackwell-Hall Factor, who received his goods by bales or packages from the manufacturing clothiers in the country, each piece of which was ſeparately tied up in brown paper, and marked by numbers on the outſide.—On receiving them into his warehouſe, they were ſometimes taken out of the bales immediately, but never out of the papers, and done up on ſhelves. Sometimes they continued in the bales till a cuſtomer called for ſuch articles as the papers contained. But no goods were ever expoſed to ſale, by hanging them in the warehouſe windows, or at the door; nor was the bulk of the pieces ever broke or ſold by retail. They were ſold entirely on commiſſion, ſometimes for home conſumption, and ſometimes for exportation. The door of the warehouſe ſometimes ſtood open; but in general it was kept ſhut, and faſtened by a latch, but not ſo as to prevent its being opened at pleaſure on either ſide.

The

GODFREY'S CASE.

The Court doubted whether this could be conſidered ſuch a *warehouſe* as is within the intent and meaning of the ſtatute on which the indictment was founded. The doubt aroſe upon the report of *Howard's Caſe* (*a*) at the Old Bailey, in the year 1751, before L. C. B. *Parker*, Mr. J. *Foſter*, and Mr. J. *Birch*; in which the Court were of opinion, that the word *warehouſes*, in the ſtatute, did not mean mere *repoſitories* for goods, but ſuch places where traders keep their goods for ſale, *in the nature of ſhops*. The preamble of the ſtatute alſo recites, that the crime of ſtealing goods privately out of *ſhops* and *warehouſes*, commonly called *ſhop-lifting*, was of late years much increaſed, *&c.* Upon this doubt, and alſo becauſe there was no proof of the priſoner's having been ſeen *in the warehouſe*, he was acquitted of the capital part of the charge.

(*a*) Foſter, 78. 2 Hawk. P. C.

Smith's Caſe.

CASE 118.

An acceſſary may controvert the guilt of the principal, notwithſtanding the record of his conviction.

OLD-BAILEY, December Seſſion, 1783.—The priſoner was indicted on the ſtatutes 3 Will. and Mary, c. 9. ſ. 4. and 5 Anne, c. 3. ſ. 5. as an acceſſary after the fact, in receiving a quantity of flour, the property of *John Peacock*, knowing it to have been ſtolen.

It appeared that two perſons, of the names of *Gilbertſon* and *Wareham*, who were ſervants to the proſecutor at the time the felony was committed, had made a full and free confeſſion of the fact of ſtealing

SMITH'S CASE. ſtealing the flour from their maſter, and that *Wareham* had been convicted as a principal in the felony, on the evidence of *Gilbertſon*, who had been admitted an evidence for the Crown.

The record of *Wareham*'s conviction was produced; but on the authority of *Macdaniel's Caſe*, in *Foſter's Reports*, the Court permitted the priſoner's Counſel to controvert the propriety of that conviction by *vivâ voce* teſtimony; and it in fact appeared, that the proſecutor had intruſted *Wareham* with the flour in ſuch a way as to make the converſion of it a *breach of truſt* only, and not a *felony*.

The priſoner was according acquitted *(a)*.

(*a*) In February Seſſion 1784, *Philip Proſſer* was indicted as an acceſſary before the fact, in procuring one *Rothwell* to counterfeit a half-penny. The record of *Rothwell's* conviction was produced; and it was admitted by Mr. Juſtice *Gould*, upon the authority of *Foſter*, that the record of the conviction of the principal was not concluſive evidence of the felony againſt the acceſſary, and that he has a right to controvert the propriety of ſuch conviction, for a record is only concluſive evidence againſt thoſe who are parties to it; but his Lordſhip gave no poſitive opinion on the point.

CASE 119.

Baker's Caſe.

What is ſufficient force to conſtitute highway robbery.

OLD-BAILEY, December Seſſion, 1783.—The priſoner was indicted for a highway robbery. It appeared that he had *ſnatched* the property from the hands of the proſecutor, as he was paſſing with it on his head by the end of an alley, but without ſpeaking to him, or ſtopping him, or in any way touching his perſon.

The

The Court *(a)* thought that this *violence* was not ſuch a degree of violence as the law required to conſtitute the crime of robbery; and the priſoner was accordingly acquitted of the capital part of the charge, and found *Guilty* of the ſingle felony. BARRR'S CASE.

At the ſame Seſſion *James Macaulay* was tried before Mr. Juſtice *Willes*, preſent Mr. Serjeant *Adair*, Recorder, for robbing *Edward Thompſon*, a boy of ten years of age, under circumſtances preciſely ſimilar to thoſe above-mentioned, and the Court adopted the ſame diſtinction *(b)*.

(*a*) Mr. *Recorder*.

(*b*) See alſo the caſe of *Wm. Chick*, in December Seſſion 1781, where the ſame rule was adopted; but in *Moor's Caſe*, where a heavy diamond pin, with a cork-ſcrew ſtalk, twiſted very much in a lady's hair, which was cloſe frizzed, and ſtrongly craped, was ſnatched out, and part of the hair torn away with it, this was held a ſufficient degree of violence to conſtitute the crime of robbery.—*Moore's Caſe*, before Mr. *Juſtice Aſhhurſt* July Seſſion 1784. So alſo where an ear-ring was ſnatched from a lady's ear, and the ear torn through by the violence. *Lapier's Caſe*, May Seſſion 1784, poſt.

Petrie's Caſe.

CASE 120.

A number of petty larcenies cannot be added together ſo as to conſtitute grand larceny; nor any number of grand larcenies, ſo as to make a capital offence.

OLD-BAILEY, January Seſſion 1784. This was an indictment on the ſtatute of 12 Anne, c. 7. for ſtealing to the amount of forty ſhillings in a dwelling-houſe.

The priſoner was ſervant to the proſecutor, and had at different times purloined his maſter's property to a very conſiderable amount; but it did not appear that he had ever taken to the amount of *forty ſhillings* at any one particular time.

Staund. 24. Dalt. 101. 2 Keb. 729. 1 Hale, 531. 1 Hawk 145.

PETRIE'S CASE.

It was held by the Court, that property ſtolen muſt not only be in the whole of ſuch a value as the law requires to conſtitute a capital offence, but that it muſt be ſtolen to that amount at one and the ſame time; for the ſeveral values of different portions of property, which have been ſtolen at different times, cannot be added together for the purpoſe of making the offence capital, they being in fact different and independent acts of ſtealing. A number of petty larcenies cannot be combined ſo as to conſtitute grand larceny; nor can any number of grand larcenies be added together, ſo as to conſtitute a capital offence.

The law of this caſe was confirmed by Mr. J. Aſhburſt, in Rex v. Farley, Lent Aſſizes for Surrey 1786.

CASE 121.

The King *againſt* Aickles.

To obtain a bill of exchange from an indorſee, under a pretence of getting it diſcounted, is felony, if the Jury find that the indorſee did not intend to leave the bill in the priſoner's poſſeſſion without the money, and that he undertook to diſcount it with a preconcerted deſign to convert its produce to his own uſe.

AT the Old Bailey, January Seſſion 1784, *John Henry Aickles* was tried before Mr. Juſtice *Heath*, preſent Mr. Juſtice *Aſhburſt*, for ſtealing a bill of exchange value 100l. the property of *Samuel Edwards*.

The following facts appeared in evidence:

Mr. *Edwards* wiſhing to get his own note of hand diſcounted, had made application to ſeveral perſons in the diſcounting line of buſineſs for that purpoſe. A few days afterwards, the priſoner, a total ſtranger to Mr. *Edwards*, left an addreſs at his lodgings while he was from home, "*Mr. H. No.* 21, *Great Pultney-ſtreet, from ſix*

"*to*

" *to ſeven in the evening, or from eleven 'till twelve* " *in the morning.*" In conſequence of this addreſs, Mr. *Edwards* the next morning called upon the priſoner in Pultney-ſtreet; and a converſation upon the ſubject of money tranſactions taking place between them, the priſoner told Mr. *Edwards* that he was in the diſcounting line, and would, whenever he choſe, diſcount a bill for him at the uſual premium of 2½ *per cent. agency*, provided it was drawn upon and accepted by a perſon of known credit and reſponſibility. About three weeks after this interview, Mr. *Edwards* again called upon the priſoner; but not finding him at home, he the next day ſent his clerk Mr. *Croxall* to enquire whether he would diſcount a bill of 100l. accepted by Mr. *Richard Wells*, of Cornhill; and requeſting that he would call in the City, that he might be fully ſatisfied of its validity. The priſoner returned with Mr. *Croxall* to the houſe of Mr. *Richard Wells*, in Cornhill; where he was ſhewn into a room to Mr. *Edwards*, who aſked him the terms upon which he would diſcount a bill for 100l. provided he approved of it. The priſoner replied, " Two and a half " *per cent. agency*, excluſive of the legal intereſt " for two months." Mr. *Edwards* immediately delivered the bill deſcribed in the indictment into the hands of the priſoner, and referred him to Mr. *Richard Wells*, the acceptor of it, who was there preſent, to ſatisfy himſelf that it was a genuine acceptance. Mr. *Wells* ſaid the acceptance was his hand-writing. The priſoner addreſſing himſelf to Mr. *Edwards* ſaid, " *Sir, if you will* " *go with me to the weſt end of the town, to Pult-* " *ney-ſtreet, I will give you the caſh.*" Mr. *Edwards* replied, " *I cannot conveniently go with*

AICKLES' CASE.

" *you myſelf, but Mr. Croxall ſhall attend you, and* " *pay you the 25s. agency, and the diſcount, on* " *receiving the hundred pounds.*" On their departure Mr. *Edwards* whiſpered his clerk not to leave the priſoner without receiving the money, nor to loſe ſight of him; promiſing to follow them in half an hour. The priſoner and Mr. *Croxall* accordingly proceeded together to the priſoner's lodgings in Pultney-ſtreet. When they arrived, the priſoner ſhewed Mr. *Croxall* into the parlour, and deſired him to wait while he fetched the money; ſaying, " *It is only about three ſtreets* " *off, and I ſhall be back again in a quarter of an* " *hour.*" Mr. *Croxall* however followed him down Pultney-ſtreet, but in turning the corner of Brewer-ſtreet loſt ſight of him. He walked backwards and forwards in the ſtreet for a length of time, in hope of ſeeing him return; but without ſucceſs. During this interval Mr. *Edwards*, who had previouſly called at the priſoner's lodgings, came up to *Croxall*, and they returned together to the priſoner's lodging, where they waited three days and three nights in a vain expectation of the priſoner's return. On the Saturday following, however, Mr. *Edwards* apprehended him at the houſe of a lady in Margaret-ſtreet, where he had dined. He expreſſed his ſorrow for what had happened; made ſeveral apologies for his miſconduct; and promiſed to return the bill: but he was carried before a Magiſtrate, who committed him " *on ſuſpicion* " *of being a common cheat.*" It was proved that the bill had been ſeen a few days before the trial, in a ſtate of negotiation in the hands of a Mr. *Smith*, and that a *ſubpœna duces tecum* had been ſerved upon him; but he did not appear, nor was the bill produced in evidence.

The

The Counſel *(a)* for the priſoner ſubmitted two points to the conſideration of the Court: 1ſt, That the bill itſelf ought to have been produced in evidence. 2dly, That the facts, admitting them to be true, do not amount to felony. AICKLES' CASE. (a) Mr. Silvester. Mr. Fielding.

The firſt Point. The bill is proved to be in exiſtence, and it is incumbent on the proſecutor to produce it. He might have taken proper meaſures for this purpoſe before he had proceeded to trial. If the bill had been loſt or deſtroyed, parole teſtimony might perhaps have been admiſſible; but it is a clear and ſettled principle of law, that parole teſtimony cannot be given of any exiſting written inſtrument. Strange, 210. Dr. Parnel's Caſe.

Second Point. To ſatisfy the definition of larceny, as it appears in the works of the moſt diſtinguiſhed writers upon Crown Law, the *property* muſt be taken from the *poſſeſſion* of another. The taking of the *property* itſelf, after it is once ſeparated from the legal poſſeſſion of its original proprietor, can never become a ſubject capable of ſupporting the allegation of larceny, eſpecially if that ſeparation be unaccompanied by thoſe ingredients which furniſh the idea of a felonious intention. The juriſprudence of the country has adopted a diſtinction between thoſe actions which are committed *animo furandi*, and thoſe which are the conſequence of *artful contrivance;* and on this diſtinction depends the great difference between *felony* and *fraud*. The criterion of a *felonious intention* is where the act of taking is by ſuch circumſtances as plainly import it to have been by *conſtraint*, and *againſt the inclination* of the owner. " *Furtum eſt tractatio rei alienæ frau-*

" *dulenta*

AICKLES'S CASE.

"*dulenta animo furandi* INVITO *illo cujus res illa* "*fuerit ;*" but where the mind of the owner is beguiled by the means of ſome deceitful practice, and under the influence of that deceit he conſents, fooliſhly perhaps, but *voluntarily*, to part with his property, it is evidence of a *fraudulent intention ;* but whether in this caſe the *poſſeſſion* accompanies the *delivery* or not, it will be impoſſible to build upon ſuch a foundation the notion of larceny, which requires that the goods ſhall be obtained againſt the owner's conſent. In the preſent caſe, there is ſcarcely evidence even of an intended fraud; much leſs any badge of felony. The priſoner, it is true, firſt introduced himſelf to the knowledge of Mr. *Edwards*, under a pretence of being able to diſcount his note, or to get it diſcounted; for the circumſtance of his requiring a premium for his trouble, implies that he was not to diſcount it himſelf, and it was perfectly immaterial to Mr. *Edwards* by which of theſe means he was to be furniſhed with the money: but whatever might have been his intention at that time, it was never carried into effect. Almoſt a month afterwards, the proſecutor makes an application to the priſoner for his aſſiſtance, and voluntarily delivers the bill into his hands, upon a truſt that he was to receive the money for it. This voluntary delivery gave to the priſoner a free and unreſtrained power over it, and enabled him to part with it to any perſon he pleaſed; and however the nonperformance of his promiſe to diſcount it, may be conſtrued a *breach of truſt*, or violation of the confidence repoſed in him, it excludes every legal idea of felony. A felonious intention muſt have a certain commencement, evidenced by ſome overt act denoting that intention; but there is nothing in this caſe from which it

it is poſſible to diſcover the point at which felony begins. The poſſeſſion of the note cannot be felony; for he received it by voluntary delivery from the proſecutor. Carrying it home to his lodgings cannot be felony; for to that act the proſecutor conſented. Going out to get it diſcounted cannot be felony; for that act was permitted and aſſented to by Mr. *Croxall*. The getting it diſcounted cannot be felony; for that was the promiſe which the proſecutor relied upon the priſoner to perform. Nor can his neglecting to return either the money or the bill be conſidered as felony; for admitting that he did in fact receive the money, the ſubſequent converſion of it, preſſed perhaps by the importunity of ſome other creditor, cannot be felony; as it was never in the proſecutor's *poſſeſſion*, and therefore cannot be ſaid to have been taken *from him*. Lord *Dyer*, page 5. ſays, "If a man deliver an "obligation to another to receive the money "due upon it, and he receives the money upon "it, and goeth away therewith, or doth con-"vert it to his own uſe, it is not felony. So "alſo if a perſon delivers wares or cattle to ano-"ther to ſell, and he ſelleth them and runs "away with the money." And Sir *William Staundforde*, a very accurate writer upon Crown Law, is of opinion, that "if a man delivers to "another a bag of money, for the purpoſe of "paying it to a creditor, or of purchaſing any "particular article, and he goes away with it, "it is not felony *co que il eſt hors de poſſeſſion*." Lord *Hale* alſo ſays, that "if *A.* comes to *B.* "and by a *falſe meſſage* or *token* receives money "of him and carries it away, it is no felony, "but a cheat, puniſhable by indictment at com-"mon law, or upon the ſtatute 33 Hen. 8. "c. 1." AICKLES' CASE.

Theſe

AICKLES' CASE.

These objections were answered by Counsel (*a*) on the part of the Crown.

(*a*) Mr. Garrow.

First Point. It is proved that the bill is in the hands of Mr. *Smith*, who has been served with a *subpœna* to produce it; and as he has refused to comply, parole testimony may be given of its contents. If it had been in the prisoner's possession, the next best evidence to the bill itself would have been admissible; for as a prisoner cannot be compelled, or even legally required to produce any evidence which may operate against himself, the next best evidence which it is in the power of a prosecutor to produce, is always admitted; and in the present case, the possession of Mr. *Smith* is to be considered as the possession of the prisoner. The principle therefore, that parole testimony cannot be given of a written instrument, unless there is a strong presumption previously raised of its being lost or destroyed, is not universal and without exception (*b*).

2 Term Rep. 201.

Second

(*b*) On the trial of an information in the Exchequer, before Mr. *Baron Eyre*, in December 1772, against one *Le Merchand*, on 7 Geo. 1. c. 21. for importing Tea *directly* into Guernsey, it appeared that the defendant had written several *original letters* to one *Channon*, a witness on the trial. *Channon* became a bankrupt, but these letters were proved to have come again into the defendant's possession, by virtue of an order of the Court of Chancery, to deliver to *him* all letters and papers seized under *Channon's* commission. The Solicitor of the Excise, however, had contrived to take copies of them whilst they were in the hands of the clerk of the commission. Notice had been given to the defendant to produce the *original letters*, which he refused to do. The Attorney General therefore offered to read the copies in evidence. It was objected, that being a *criminal prosecution*, the defendant was not bound by the notice to produce evidence against himself; and therefore the copies could not be read in evidence against him. Mr. *Baron Eyre* thought there was no difference in this point between *civil* and *criminal* cases, and he admitted the *copies* in evidence; not on the idea of the defendant's having after notice refused to produce the originals,

AICKLES' CASE.

Second Point. I am not diſpoſed to controvert the definition which has been given of the nature of larceny. I admit that there muſt be a *felonious* taking of the property from the *poſſeſſion* of the proprietor, and on that admiſſion I am perfectly contented to argue the law of this caſe; for I am warranted, by a ſeries of uncontroverted deciſions, in ſaying, that the bill in queſtion was, to the moment of its converſion, not in the legal poſſeſſion of the priſoner, but of Mr. *Edwards*. I acknowledge that it is highly important to the juriſprudence of the country, that the legal diſtinction between fraud and felony ſhould be preſerved; but it would bring a contempt on the juſtice of the nation, to ſuffer its laws to be evaded by ſuch little contrivances as the priſoner made uſe of to obtain the bill. A man goes to Smithfield-market and cheapens a horſe, which

originals, but becauſe they were the beſt evidence which the nature of the caſe would admit of, or that was in the power of the party producing them to give. The verdict turned entirely upon this evidence, and the Jury found for the Crown. On argument for a new trial, the Court diſcharged the rule, and confirmed the principles upon which the evidence had been admitted.—In *Layer's Caſe*, 6 *St. Trials*, 229. for high treaſon, it was proved that he had ſhewn a witneſs a paper, partly doubled up, which contained the treaſonable matter, and then immediately put it into his pocket; and the witneſs was permitted to give parole teſtimony on that part of the contents of the paper which he had ſeen.—At O. B. Sept. Seſſ. 1784, *Colonel Gordon* was tried for the murder of *L. C. Thomas* in a duel. The letter from *C. Gordon*, containing the challenge, was carried by his ſervant, and delivered to the ſervant of *C. Thomas*. *Col. Thomas's* ſervant brought a letter in anſwer back, and delivered it to *Col. Gordon's* ſervant; but it did not appear that the letter was *in fact* ever delivered to *Col. Gordon* himſelf; yet Mr. *Baron Eyre* admitted *an atteſted copy* of it to be read againſt the priſoner; and left it with the Jury as legal evidence, if they were of opinion that the original had ever reached the priſoner's hands. Mr. *Baron Hotham* concurred; but Mr. *Juſtice Gould*, thought that poſitive proof ought to have been given, that *the original* had come into the priſoner's poſſeſſion, and cited *Francis's Caſe*, 6 *St. Trials*, 58.

the

AICKLES' CASE.

the owner delivers to him for the purpoſe of trying its paces. Upon this occaſion the common underſtandings of mankind would perhaps decide that the *actual poſſeſſion* of the owner was determined and gone by the delivery; but in the contemplation of law, if it ſhall afterwards appear that the poſſeſſion was obtained with intent to ſteal it, the delivery will not alter the *legal poſſeſſion*. The caſe of *Sharpleſs* (*a*), about nine years ago at this place, will confirm the doctrine for which I contend. *Sharpleſs* went to the ſhop of a hoſier, and ordered a quantity of goods to be ſent to his lodgings. The hoſier with proper caution ordered the ſervant not to leave the goods without the money. *Sharpleſs*, however, contrived to ſend back the ſervant and keep the goods, which he afterwards converted to his own uſe; and the Judges determined, that this was a felonious taking. The ſame principle is, if poſſible, more ſtrongly recognized in two caſes determined very recently. Firſt, *the King v. Patch* (*b*). A man drops a ring, and on pretence of dividing its produce with ſome by-ſtander, he picks it up, and then delivers it to the object of his deſign, taking as a ſecurity for his proportion of its value, a watch, or a cloak, or any other thing, which he converts to his own uſe. Here there is ſomething given for the thing ſtolen, and this has frequently been determined to be felony; and yet after the watch or cloak are delivered, it is impoſſible to ſay that the actual poſſeſſion is not changed. The ſecond caſe is *the King v. Parcs* (*c*), which a very ſhort time ſince received the ſolemn determination of all the Judges of England. A man hires a horſe, on pretence of taking a diſtant journey into Eſſex. In point of fact he never takes

(*a*) Ante, P. 95.

(*b*) Ante, p. 231.

(*c*) Ante, p. 213.

takes ſuch a journey, but ſells the horſe: this is determined to be felony. But I have troubled the Court with more caſes than it was neceſſary to have cited in ſupport of ſo clear a poſition; and I ſhall therefore only ſtate one more, in anſwer to the obſervations which have been made, to prove that the poſſeſſion was parted with when the note was delivered. A man goes to a public-houſe, and orders a pot of beer and change for a guinea to be ſent to the houſe of Mr. *Stiles;* and when it is brought, he ſends the ſervant back on ſome pretence, takes the change, and goes off. Had the publican who remained in the bar of his houſe any more controul over, or actual poſſeſſion of his money, than any man who hears me? And yet this Court has with great wiſdom held, that this taking is felony (*d*). But it is aſked, At what preciſe period of time the felony in the preſent caſe can be ſaid to have commenced? I anſwer, Preciſely at the ſame period of time at which it commenced in the caſes I have cited. In *Pares' Caſe*, it commenced the inſtant in which he put his foot in the ſtirrup with an intent to ſteal the horſe: ſo here the felony commenced at the inſtant in which the priſoner got the note into his hand, with a felonious intent to convert it to his own uſe. AICKLES' CASE.

(*d*) In the caſe of *Ann Atkinſon*, in December Seſſ. 177[illegible], before Mr. *Juſtice Willes*, and Mr. *Baron Hotham*, the priſoner obtained ten guineas on pretence of getting them changed into half-guineas, and never returned them; and ſhe was found guilty.—*Sed quære*, if the caſe was not ſaved?—In the caſe of *Cath. Colma[illegible]*, June Seſſ. 1785, the priſoner went to a public-houſe, and ſaid ſhe came from a Mrs. *Cook*, a neighbour, who would be much obliged if the publican would let her have half-a-guinea's worth of ſilver, and that ſhe would ſend the half guinea. She got the ſilver and never returned; and this was held no felony.

The

AICKLES' CASE. The Court left the caſe with the Jury to conſider, *firſt*, Whether they thought the priſoner had a preconcerted deſign to get the note into his poſſeſſion, with an intent to ſteal it? and *ſecondly*, Whether the proſecutor intended to part with the note to the priſoner, without having the money paid before he parted with it? They found the affirmative of the firſt queſtion, and the negative of the ſecond; and concluded that the priſoner was therefore Guilty.

The judgment was reſpited, and the following queſtions referred to the conſideration of the twelve Judges.

Firſt, Whether as the bill in queſtion had not been produced, the parole teſtimony which had been given concerning it was legally received?

Secondly, Whether the priſoner was guilty of Felony, under all the circumſtances of this caſe?

The Judges met at Serjeants Inn Hall to conſider of this caſe; and they were unanimouſly of opinion, That the parole teſtimony had been properly received; and as the Jury had found a preconcerted deſign in the priſoner to ſteal the note, he had been legally convicted of felony.

In the July Seſſion following, he received ſentence to be tranſported to *America*, for the term of ſeven years. In March 1785, however, he received the Royal pardon, on condition of tranſporting himſelf beyond the ſeas, within fourteen days from the day of his diſcharge, and giving ſecurity

ſecurity to the ſatisfaction of the Recorder ſo to do; and having given ſuch ſecurity, he was diſcharged from Newgate on 14th March, 1785, by virtue of the Recorder's warrant; but on the 26th May following, he was apprehended at Iſlington, and indicted for being found at large without lawful cauſe (*a*).

AICKLES' CASE.

(*a*) Vide poſt Sept. Seſſ. 1785.

John Seas' Caſe.

CASE 122.

OLD-BAILEY, February Seſſion 1785, the priſoner was indicted on the ſtatute 10 and 11 Will. 3. c. 23. for ſtealing a cloth coat called a Box-Coat, the property of *Samuel Hayes*, Eſq; privily in his ſtable.

Qy. If a coachman's livery great coat can be conſidered as *goods* belonging to a *ſtable*, within the meaning of 10 & 11 Will. 3. c. 23.

It appeared to be a livery great coat, which the proſecutor's coachman had hung up in the ſtables, while he went into the houſe to receive his wages.

The ſtatute upon which the indictment was founded, excludes all perſons from the benefit of clergy, who ſhall in any "ſhop, warehouſe, "coach-houſe, or ſtable, privately and feloniouſly "ſteal any goods, wares, or merchandizes, of "the value of five ſhillings." But it has been uniformly held, that the goods ſtolen muſt be ſuch as are proper to, and uſually kept in, the reſpective places which the Act deſcribes.

The

SEAS' CASE.

The Court therefore doubted, Whether a coachman's livery great coat could be conſidered as any part of the proper or uſual furniture of a ſtable; which ſeems only to include bridles, ſaddles, horſe-cloths, and ſuch other articles as are neceſſary or uſeful therein. Upon this doubt the priſoner was acquitted of the capital part of the charge.

CASE 123.

Thomas Turner's Caſe.

Lofts over coach houſes and ſtables converted into lodging-rooms, are the dwelling-houſes of their inhabitants, if there is an outer door, &c. &c.

AT the Old Bailey, February Seſſion 1784, *Thomas Turner* was tried before Mr. Juſtice *Buller*, preſent Mr. Juſtice *Gould*, and Mr. Baron *Perryn*, for burglary in the dwelling-houſe of *Edward Whitmead*.

The proſecutor was coachman to *Lady Hervey*, and rented two lodging-rooms, which were ſituated over the coach-houſe and ſtables, at ſix pounds ten ſhillings a year; but he had never paid any rent, nor were they rated in the pariſh-books as dwelling-houſes, but as appurtenances to the coach-houſe and ſtables.

The way to the coach-houſe and ſtables was down a paſſage out of Mill-Hill Mews, and the Mews was an open thoroughfare both day and night. The entrance to the ſtair-caſe which led to theſe rooms, was through a door, which was never faſtened, out of the paſſage leading to the coach-houſe and ſtables. There was a ſingle door at the top of the ſtair-caſe to each of the proſecutor's rooms, which were locked at night; and there were other rooms over the coach-houſe and

and ſtables, ſituated in the ſame manner as thoſe which the proſecutor rented. It was one of theſe rooms which was broke and entered by the priſoner. TURNER'S CASE.

The priſoner's Counſel contended, that this was a new caſe; and that theſe rooms, which probably were originally intended as mere hay-lofts, did not, in contemplation of law, form ſuch manſions or dwelling-houſes as to become the ſubject of burglary.

Mr. Juſtice *Gould* and Mr. Baron *Perryn* conceived that the circumſtance of their being ſituated over the coach-houſe and ſtables, would not alter the nature of the caſe. They were to all intents and purpoſes the habitation and *domicile* of the proſecutor and his family; for they are perfectly diſtinct and unconnected with thoſe rooms which were inhabited by other tenants; and although the two rooms which were broke open, happened to communicate with each other only by means of the landing-place, or platform, yet they may well be conſidered as the manſion-houſe of the occupier. The door at the bottom of the ſtair-caſe, though unfaſtened, is an *outer door* common to all the inmates under the ſame roof; and the reſpective doors to the rooms of each inmate, are the ſafeguards or *inner doors* of their ſeveral inhabitants; and cited the caſe of *the King v. Rogers* (*a*), determined Michaelmas Term 13 Geo. 3. Mr. Juſtice *Butler* did not give any opinion, but ſaid he would ſave the caſe for the conſideration of the twelve Judges.

(*a*) Ante, p. 90.

The Jury found the priſoner Not Guilty of breaking and entering in the night-time; but if the

TURNER'S CASE.

the Judges ſhould be of opinion, That the place where the proſecutor inhabited was a *dwelling-houſe*, then Guilty of ſtealing to the value of forty ſhillings out of the dwelling-houſe: and if the Judges ſhould be of opinion, That it was not a dwelling-houſe, then Guilty of ſtealing, but not in the dwelling-houſe.

In the July Seſſion following the priſoner was put to the bar, and informed by Mr. Reynolds, *Clerk of the Arraigns*, that his caſe had been conſidered by the Judges; and that they were of opinion, That he was guilty of the *felony* charged againſt him in the indictment.

Wooldridge's Caſe.

CASE 124.

AT the Old Bailey, February Seſſion 1784, the priſoner was indicted before Mr. Juſtice *Gould*, preſent Mr. Baron *Perryn*, on the ſtatute of 8 and 9 Will. 3. c. 26. ſ. 6. which enacts, "That whoever ſhall take, receive, pay, or *put* "*off* any counterfeit milled money, or any milled "money whatſoever, unlawfully diminiſhed, "and not cut in pieces, at or for a lower rate or "value than the ſame by its denomination doth "or ſhall import, or was coined or counterfeited "for, ſhall be guilty of felony."

What act ſhall be conſidered as a *putting off* counterfeit money within the meaning of 8 and 9 Will. 3. c. 26.

It appeared in evidence, that the priſoner had carried a large quantity of counterfeited milled money, of the likeneſs and ſimilitude of ſhillings, to the houſe of a Mrs. *Levey*, which ſhe agreed to *take and receive* from him, and which he agreed to *pay and put off* to her at the rate of Twenty-nine Shillings for every Guinea. In purſuance of this bargain the priſoner laid a heap of counterfeit ſhillings on a table, and Mrs. *Levey* proceeded to count them out at the rate beforementioned. She had counted out three parcels, containing Eighty-ſeven counterfeit Shillings, for which ſhe was to pay the priſoner Three Guineas. But before ſhe had paid him, and while the counterfeit money lay thus expoſed upon the table, the officers of juſtice entered the room and apprehended them. Mrs. *Levey* was admitted an evidence for the Crown; and ſhe ſwore that ſhe had bought the three parcels of Shillings, and was going to pay the priſoner Three Guineas for them at the moment they were detected.

WOOLD-RIDGE'S CASE.

It was contended on the part of the priſoner, that the indictment, purſuing the words of the ſtatute, alledged this ſubſtantive fact, "that "the priſoner feloniouſly did *put off* the counter-"feit money to *Elizabeth Levey*;" but that the evidence did not prove a *putting off*, within the true intent and meaning of the Legiſlature; for that before the offence could be *committed*, it was neceſſary that the contract or agreement to *pay* and *put off* on the one hand, and to *take* and *receive* on the other, ſhould be finally completed and ended; which in this caſe had not taken place, Mrs. *Levey* not having paid the money to the priſoner.

On the ſide of the Crown it was contended, that the priſoner having *ſold* and given Mrs. *Levey poſſeſſion* of the counterfeit Shillings, it was on his part a completion of the contract; for he had thereby done every thing that he was enabled to do in "*paying and putting off*," and that it remained intirely with Mrs. *Levey* to fulfil the ſubſequent part by *taking and receiving* the counterfeit money which he had ſo *paid and put off*.

The Court. It is clear beyond a doubt, that the offence charged in this indictment muſt be meaſured by *the terms* of the ſtatute upon which it is founded; and whatever progreſs the perſon indicted may have made towards *putting off* the counterfeited coin, if the act of *putting off* is not finally completed, it does not amount to the crime expreſſed. An ardent wiſh to aboliſh an illegal practice is certainly laudable, but Judges muſt take care that laws which affect the liberties and lives of their fellow-ſubjects, are not ſtretched beyond their true and legal import.

The

The county of York was formerly notorious for the practice of coining, and a general anxiety prevailed to bring every offender to puniſhment. A man was indicted at the Aſſizes, before Mr. Juſtice *Gould*, for coining a Guinea. The impreſſions, both on the head ſide of it and the reverſe, were perfect and compleat. It appeared, however, that the priſoner had delivered it to a perſon to get it changed, and that from ſome aukward roughneſs upon the edges of it, nobody would take it. The learned Judge from this circumſtance conceived, that the treaſon, though brought very near to a completion, was not quite completed; and the caſe was referred to the conſideration of the twelve Judges, who were unanimouſly of opinion, that the offence was not committed (*a*). In the preſent caſe the operative words of the Act of Parliament are, "take, receive, pay, or put off;" and theſe words muſt be conſtrued according to their popular acceptation. Now, is not the common meaning of the expreſſion, "I have *put off* ſuch a piece of coin," that the party has *got rid of it?* Suppoſe a perſon having looked out goods at the ſhop of a tradeſman, is about to pay for them, and while the goods lie packed up upon the counter, the tradeſman diſcovers that the money his cuſtomer *is paying* is counterfeit; is the money in this caſe either taken or *received* by the tradeſman, or *paid* or *put off* by the cuſtomer? Certainly it is not. By this detection the meditated offence is rendered incomplete, and the intention to *pay* and *put off* the money diſappointed. It did not reach its effect; it was ſtopped before it had arrived at the goal. But the Legiſlature have themſelves decided this queſtion; for by a ſubſequent ſtatute they have provided for the offence which the evi-

WOOLDRIDGE'S CASE.

(*a*) The King v. Varley, 2 Black. Rep. 682. Ante, p. 75.

WOOLDRIDGE'S CASE.

dence in this caſe has proved, *viz.* an *uttering* and *tendering* in payment: for it is enacted by 15 Geo. 2. c. 28. "That whoever ſhall knowingly "*utter* or *tender* in payment any falſe or coun- "terfeit money, ſhall ſuffer ſix months impriſon- "ment, and find ſureties for good behaviour "for ſix months more, *&c.*"

The priſoner was acquitted of this charge; but he was convicted upon another indictment, of having *put off* a counterfeit Half-Guinea at a lower rate than it denominated: and having been before convicted of a felony, and allowed the benefit of clergy, the Counſel for the Crown, on the priſoner's pleading that privilege a ſecond time, filed a counter-plea of record againſt its being allowed; in conſequence of which the priſoner received judgment of death in the September Seſſion following.

The

The King *againſt* Jacobs and others.

CASE 125.

AT the Old Bailey, in February Seſſion 1784, *John Jacobs*, *Samuel Selſhire*, and *Richard Macdonald*, were tried before Mr. Juſtice *Gould* for a highway-robbery.

Parole evidence ſhall not be given of the examination of priſoners taken before the Magiſtrate; for it muſt be intended that it was put into *writing*, as the law requires.

It appeared, that when the priſoners were carried before a Juſtice of the Peace, *Samuel Selſhire* had been admitted to give evidence againſt *Jacobs* and *Macdonald*, and that they had all made a full confeſſion of their guilt; but neither the information of *Selſhire*, nor the confeſſion of the other two priſoners were taken down in writing. The proſecutor attempted to give *vivâ voce* teſtimony of their confeſſions.

Mr. *Reynolds*, the Clerk of the Arraigns, ſaid, it had been the conſtant practice of the Court, that when the Juſtice has neglected to take a written examination, parole teſtimony of it may be admitted; but that if he has reduced ſuch examination into writing, no other evidence of it could be received.

The Court. The Legiſlature, by the ſtatutes 1 and 2 Phil. and Mary, c. 13. ſ. 4. and 2 and 3 Phil. and Mary, c. 10. has ordered, "That "Juſtices of Peace, when any priſoner is brought "before them on a charge of felony, *ſhall* take "the examination of the ſaid priſoner, and the "information of them that bring him, of the fact "and circumſtances thereof; and the ſame, or "as much thereof as may be neceſſary to prove "the felony, ſhall be put in writing within two "days after the ſaid examination, and certified

"to

JACOBS' CASE.

" to the next general Gaol Delivery." The ſtatutes do not leave this matter to the option of the Magiſtrate, but they ſay that he *ſhall* do it; and, whatever may have crept into practice, the directions of this law ought not to be diſpenſed with. The rule of law is the compaſs by which the Court ought to be guided. What a priſoner ſays in other places may undoubtedly be received upon *vivâ voce* teſtimony; but as the law requires that his examination before the Magiſtrate ſhall be reduced into writing, and returned to the Court, the particulars of ſuch examination cannot be given in evidence *vivâ voce*, although in fact ſuch examination never was reduced into writing (*a*).

(*a*) In July Seſſion 1784. *John Hinxman* was tried for a felony before Mr Juſtice *Aſhurſt*. The priſoner had made a confeſſion before the Juſtice of the Peace, but his examination was not returned, and it was uncertain whether it had ever been reduced into writing. It was objected on the authority of *Jacobs' Caſe*, that parole evidence could not be given of any thing which had been diſcloſed by the priſoner before the Magiſtrate, for that it would be permitting his negligence and breach of duty to operate to the prejudice of the priſoner; as a witneſs, by ſelecting only part of what had been ſaid, might, by uſing different words, give a different colour to the fact. The Court refuſed the oral teſtimony. See *Rex* v. *Fearſhire*, p. 448.

Newland's

Newland's Caſe.

CASE 126.

To repel the teſtimony of a witneſs on the ground of *intereſt*, the intereſt muſt be direct and immediate.

AT the Old Bailey, in February Seſſion *Abraham Newland* was indicted before Mr. Baron *Perryn*, preſent Mr. Serjeant *Adair*, Recorder, for forging a bank-note, ſigned "*William Lander, For the Governor and Company of the Bank of England.*"

Mr. *Lander* was a Caſhier of the Bank of England, properly authoriſed by the Directors to ſubſcribe bank-notes with his own name for the Governor and Company; and had given ſecurity to them for the faithful performance of this duty.

The Queſtion was, Whether Mr. *Lander* was a competent witneſs to prove that the bank-note charged to be forged was not *a genuine* bank-note, and that the name "*William Lander*" ſubſcribed thereto was not his hand-writing?

Mr. *Garrow*, for the priſoner, contended, that Mr. *Lander* was an incompetent witneſs, from the intereſt which he had in the event of the proſecution; for, upon a ſuppoſition that he had ſigned the note by virtue of the authority delegated to him for that purpoſe by the Court of Directors, and had iſſued it, ſo ſigned, without carrying it to the account of the Bank, he would be liable to a criminal proſecution for the fraud, and to a civil action on his ſecurity bonds, for the damage which the Bank might eventually ſuſtain; and therefore, although perhaps he was not perſonally liable to the holder for the amount of the note, he was deeply intereſted to ſwear that

NEWLAND'S CASE.

that the name ſubſcribed to it was a forgery, as the only means of avoiding the detection of the fraud. An intereſt, however faint or remote, is ſufficient to deſtroy the competency of the witneſs. A commoner who comes to ſay, that a common is not commonable but for ſuch a number of cattle, or to ſuch a deſcription of perſons; a corporation who would confine the exerciſe of a franchiſe; a pariſhioner in a queſtion concerning the removal of a pauper; are all inadmiſſible witneſſes, on the ground of intereſt; and yet their intereſt is extremely diſtant and minute. A maſter may maintain the ſuit of his ſervant; but if he acknowledges that he is under an honorary conſideration to pay his coſts, he cannot be examined in his cauſe (*a*). Suppoſe a ſervant aſſaulted in defence of his maſter; if on the trial of an action for this injury the maſter was to declare, that although he was not bound in law to defray the coſts of an acquittal, yet that in honour and generoſity he ought not to permit his ſervant to ſuffer, his teſtimony would be rejected, from the preſumed bias of his mind, on the ground of intereſt: for, to uſe the words of Lord *Manſfield*, "Courts of juſtice do not ſit to weigh "what degree of temptation the minds of men "are capable of reſiſting, but to take care that "they ſhall not be expoſed to any temptations "whatſoever." If this were the caſe of a common forgery, the objection would be unanſwerable; for it is ſettled that a perſon who has ſubſcribed a note, and is therefore *primâ facie* liable to pay it, cannot be examined to impeach the ſecurity; and the intereſt which Mr. *Lander* has upon the preſent occaſion cannot be thought leſs conſiderable.

(*a*) A witneſs was rejected on this ground by L. C. B. Parker, *per* Mr. Baron Perryn in Wooldridge's caſe, O. B. February Seſſ. 1784

1 Term Rep. 296.

Mr.

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Mr. *Bearcroft*, for the Crown. It has been the conſtant and unoppoſed practice of Courts to admit the Caſhiers of the Bank to prove the forgery of their ſignatures to bank-notes. It is certainly true, that when a witneſs is called to prove a propoſition in which he is directly intereſted to ſay "*Yes*" rather than "*No*," he ſhall not be admitted as a witneſs to ſay "*Yes*." I admit alſo, that the queſtion is not on the quantity of intereſt; for if an intereſt amounts only to five ſhillings, it is equally objectionable, as if it amounted to twenty thouſand pounds. I admit alſo, that if Mr. *Lander* came here to prove the forgery of his own note, he would not be a competent witneſs, becauſe his own note he would be *primâ facie* liable to pay; but Mr. *Lander*'s ſignature as a Caſhier of the Bank does not bind himſelf, for it profeſſes to be "*for the* "*Governor and Company of the Bank of England;*" and the holder of a note ſo ſigned can call only on the Governor and Company to pay it. The fact of Mr. *Lander*'s not being perſonally liable, is a ſufficient anſwer to this objection; for nothing but an immediate direct and perſonal intereſt is ſufficiently ſtrong to overthrow the competency of a witneſs. The objection indeed cannot be ſpeciouſly ſtated, except on a preſumption of Mr. *Lander*'s having abuſed his truſt; but the rule of law is to preſume *innocence* until *guilt* is proved; and therefore an intereſt cannot be inferred from ſuch a preſumption, in order to ground an objection to the competency of his evidence.

The Court. This caſe is perfectly clear. Mr. *Lander* does not make himſelf perſonally reſponſible, by ſigning bank-notes in his own name "for

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"for the Governor and Company of the Bank "of England;" and the law will not permit ſo forced and violent a preſumption to be raiſed, as that a man is guilty of a crime, in order to lay a platform on which to raiſe an objection to his competency on the ground of intereſt. To repel the evidence of a witneſs who comes to prove the forgery of his own hand-writing, it muſt appear that he would be liable to be ſued in caſe it was genuine. The intereſt muſt be apparent on the face of the inſtrument itſelf, or ariſe immediately from the nature of the tranſaction, or from his own acknowlegement; for if a witneſs admits himſelf to have an intereſt, whether he has an intereſt in fact or not, yet the belief of it has an equal operation on his mind; and in either of theſe caſes, it would be an objection to his teſtimony. In the preſent caſe, unleſs criminality be preſumed, intereſt cannot be inferred; and ſuch a preſumption is certainly repugnant to the firſt principles of law.

See Weller's Caſe, Onſlow's Niſi Prius, p. 252. 1 Strange, 129. Dougl. 134. 1 Term Rep. 296.

Mr. *Lander*'s evidence was accordingly received, but the priſoner was acquitted (*a*),

(*a*) After the riots in the year 1780, a reward was offered by Government for the apprehenſion and conviction of any of the rioters, and a queſtion aroſe, Whether perſons thus intereſted in the conviction of the criminals were admiſſible witneſſes againſt them? It was ſubmitted to the conſideration of the twelve Judges; and they unanimouſly agreed, That the teſtimony of witneſſes who were intitled to and claimed the reward was admiſſible, notwithſtanding that intereſt; and they mentioned the caſe of robbery, &c. where not only reſtitution of the ſtolen goods, but the title to the parliamentary reward, depended on the conviction of the offenders; and the caſe of witneſſes intitled to rewards from the Bank, Poſt Offices, and other public places; and yet theſe rewards had never been conſidered as giving ſuch an intereſt as would deſtroy the competency of the witneſs *MS.* See alſo Mr. Onſlow's Niſi Prius, 251.

Humphrey

Humphrey Moore's Caſe.

CASE 127.

To aid and aſſiſt a perſon, to the Jurors unknown, to obtain money by the practice of *ring-dropping*, is felony, if the Jury find that the priſoner was confederating with the perſon unknown to obtain the money by means of the ring.

THIS was a caſe reſerved for the opinion of the twelve Judges by *James Adair*, Eſq. *Recorder*, at the Old Bailey, in April Seſſion, 1784, upon the trial of an indictment for ſtealing Twenty Guineas, and four pieces of foreign gold coin called Doubloons, the property of *John Field*, in the dwelling-houſe of *John Brown*.

The material circumſtances of this caſe, as they appeared in evidence, were as follow: The proſecutor *John Field*, a ſoldier, juſt returned from the war in America, was walking along James-Street, Covent-Garden, when a ſtranger joined company with him. As they walked in friendly converſation with each other down *Long-Acre*, the ſtranger ſuddenly ſtopped, and picked up a purſe which was lying at a door. After they had proceeded about forty yards, "Come," ſays the ſtranger, "We will go and drink a pot of porter, "and ſee what we have picked up." The proſecutor was perſuaded to comply; and they accordingly went into a private room in an adjacent public-houſe, where the ſtranger pulled out the purſe, and from one end of it produced a receipt, ſigned "*W. Smith*," for 210l. for one brilliant diamond cluſter ring, and from the other end he pulled out the ring itſelf. A converſation enſued upon the ſubject of their good fortune, during which time the priſoner, *Humphrey Moore*, entered the room; and being ſhewed the ring, he praiſed the beauty of its luſtre, and offered to ſettle the diviſion of its value. Upon the ſtranger's lamenting

MOORE'S CASE. lamenting that he had no money, the priſoner aſked the proſecutor if *he* had any. The proſecutor replied, that he had *forty* or *fifty pounds* at home. "That ſum will juſt do," ſaid the priſoner. A coach was immediately called, and all three were driven to the proſecutor's lodgings at *Chelſea*. The proſecutor and the ſtranger went into the houſe together, leaving the priſoner at the door. The proſecutor took his money from his bureau, put it into his pocket, and returned with the ſtranger to a public-houſe in the Five-Fields, Chelſea, kept by *John Brown*, where they again met the priſoner, who ſaid, "I will give "you your ſhare of the ring, if you will be con-"tent till to-morrow." The proſecutor put down Twenty Guineas and four Doubloons, which the ſtranger took up, and in return gave the proſecutor the ring; deſiring that he would meet him at the ſame place on the next morning at nine o'clock, and promiſing that he would then return the Twenty Guineas and the four Doubloons to the proſecutor, and alſo One Hundred Guineas for his ſhare of the ring. The priſoner and the ſtranger went away together. The proſecutor attended the next morning purſuant to the appointment, but neither of the parties came. The ring was of a very trifling value.

It was left with the Jury to conſider, Whether the priſoner and the other man were not in concert together; and they were of opinion, that the priſoner was confederating with the perſon unknown for the purpoſe of obtaining the money by means of the ring, and did therefore aid and aſſiſt the perſon unknown in obtaining the Twenty Guineas and the four Doubloons from the proſecutor. They accordingly found him guilty of

of ſtealing, but not in the dwelling-houſe, ſubject to the opinion of the twelve Judges, whether it was felony. MOORE'S CASE.

On the firſt day of Michaelmas Term 1784, all the Judges, except Lord *Mansfield*, aſſembled at Lord *Loughborough*'s Chambers, to conſult upon this caſe; and in the December Seſſion following Mr. Juſtice *Willes* delivered their opinion at the Old Bailey to the following effect: All the Judges agreed, That in conſidering the nature of larceny, it was neceſſary to attend to the diſtinction between the parting with the *poſſeſſion* and the parting with the *property* only; that in the firſt caſe it is felony, and in the laſt caſe it is not. Upon the circumſtances of the preſent caſe two of the Judges *(a)* were of opinion, that the Doubloons were to be conſidered as money, and that the whole was *a loan* on the ſecurity of the ring, which the proſecutor believed to be of much greater value than the money he advanced on it, and therefore that the poſſeſſion as well as the property was parted with: But nine of the Judges were clearly of opinion that it was felony; for they thought the Twenty Guineas and the four Doubloons were only depoſited in the nature of a pledge till the half of the ſuppoſed value of the ring was paid to the proſecutor, and therefore he had parted with the property only, and not with the poſſeſſion; and they could not diſtinguiſh this caſe from *the King v. Patch*, tried in this Court before Mr. Juſtice *Gould* in February Seſſion, 1782 *(b)*, and *the King v. Pares*, in September Seſſion 1779. The majority of the Judges therefore were of opinion, That

(a) Lord Loughborough, Ld. Ch. Baron Skynner.

(b) Vide ante, p. 231.

MOORE'S CASE. That this caſe had been properly left to the Jury; and that the priſoner was guilty of felony (*a*).

The priſoner was accordingly tranſported.

(*a*) In October Seſſion 1784, *Richard Marſh* was convicted before Lord *Loughborough* for an offence of the ſame kind, but the judgment was reſpited until this caſe was determined.

CASE 128.

Moſes Pike's Caſe.

To ſteal from a barge aground in Limehouſe dock, is not within the 24 Geo. 2. c. 45.

AT the Old Bailey, in May Seſſion 1784, the priſoner was tried before Mr. Serjeant *Adair*, *Recorder*, on the ſtatute 24 Geo. 2. c. 45. for ſtealing a quantity of deals in a barge on *the navigable river Thames*.

It appeared in evidence, that a barge full of deals, belonging to the proſecutor, was navigating down the *Thames*; but the lighterman being fearful that the barge would ſink, unloaded a portion of his cargo into a long-boat, and brought both the barge and the long-boat into Limehouſe-dock, where he moored them. By the efflux of the tide they were left aground, and in the night the long-boat, with the deals mentioned in the indictment, which were much above the value of forty ſhillings, were ſtolen.

The Court held, That this was not a caſe within the meaning of the Act of Parliament.

Joſeph

Joſeph Hickman's Caſe.

CASE 129.

AT the Old Bailey, in May Seſſion 1784, *Joſeph Hickman*, and *James Dyer* were convicted before Mr. *Baron Perryn*, on the ſtatute of 4 Geo. 2. c. 32. for ſtealing lead affixed to the pariſh-church of *Hendon*.

"*A church*" is a "*building*," within the meaning of 4 Geo. 2. c. 32. and an indictment for ſtealing lead affixed thereto, need not ſtate the perſon in whom the property of the freehold reſides.

The indictment contained three counts. The *firſt* laid the lead to be the property of *Carrington Garrick*, the vicar. The *ſecond* laid it to be the property of *John Bond* and *Ralph Mitcheſon*, the church-wardens. The *third* laid it to be the property of the inhabitants and pariſhioners of the ſaid pariſh.

Property affixed to the freehold, as in the preſent caſe, was not at common law the ſubject of larceny, provided it was ſevered and carried away at the ſame time. To remedy the inconvenience ariſing from this diſtinction, the ſtatute upon which the indictment was founded, enacts, "that "whoever ſhall ſteal, rip, cut, or break with in- "tent to ſteal, any lead, iron bar, iron grate, "iron paliſadoes, or iron rail whatſoever, being "fixed to any dwelling-houſe, out-houſe, coach- "houſe, ſtable or other building, uſed or occu- "pied with ſuch dwelling-houſe, or thereunto "belonging, or to *any building whatſoever*, or "fixed in any garden, orchard, court-yard, or "outlet belonging to any dwelling-houſe, or *other* "*building*, ſhall be guilty of felony."

The Court therefore doubted, Whether the property was properly laid in the indictment; the freehold of the church to which it was affixed, not being in the poſſeſſion of the vicar, the church-wardens,

HICKMAN'S CASE.

wardens, or the inhabitants and pariſhioners; and upon this doubt the caſe was referred to the conſideration of the twelve Judges.

In May Seſſion 1785, Mr. Juſtice *Willes* delivered the Judges opinion, That "*a church*" was included within the general words of the ſtatute, "*any building whatſoever;*" and that ſtealing any of the ſpecies of property mentioned in the Act, from any building within the meaning of the Act, is felony, without regarding the perſon in whom the property or the freehold of the church by law reſides. The firſt count charges that the lead was ſtolen from "the pa-"riſh-church of Hendon;" and this is a ſufficient deſcription of the offence, and therefore the conviction is right.

In January Seſſion 1785, *Richard Iſley* was convicted upon the ſame Act of Parliament, for ſtealing lead fixed to a certain building called a Church, belonging to the pariſh of Weſt-Drayton; and the property was laid to be in, 1ſt, the vicar; and 2dly, the church-wardens: but the judgment was reſpited, and the caſe referred to the Judges; who were of opinion, That his caſe was exactly the ſame, in point of law, with that of *Hickman and Dyer*, and that his conviction was legal.

James

James Lapier's Caſe.

CASE 129.

AT the Old Bailey, in May Seſſion 1784, *James Lapier* was indicted before Mr. Baron *Perryn*, for aſſaulting *Albina Hobart*, and taking from her perſon violently, and againſt her will, one gold ear-ring ſet with diamonds, value 150l. the property of her huſband *George Hobart*, Eſq.

What ſhall be conſidereda ſufficient *taking away*, to conſtitute the crime of larceny.

The circumſtances of this caſe, as they appeared in evidence, were as follow;

Mrs. *Hobart* was retiring from the Opera-houſe, through the King's door, towards her carriage, which had drawn up cloſe to the pavement of the ſtreet to receive her. Whilſt ſhe was preparing to ſtep in, ſhe felt a perſon, who was proved to be the priſoner, take hold of her ear, and pull her ear-ring as if endeavouring to pull it off. Her ear by this violence was torn entirely through; the ear-ring ſeparated from the ear; and Mrs. *Hobart* conceived it had been *taken away*: but on her arrival at home, it was found amongſt the curls of her hair. There was no proof that the ear-ring was ever ſeen in the priſoner's hand; but his hand was ſeen elevated to her ear, and at that inſtant Mrs. *Hobart* exclaimed, "I have loſt my ear-ring."

Mr. Baron *Perryn*, to the Jury. Robbery is only an aggravated ſpecies of larceny; and to conſtitute a larceny, it is eſſential there ſhould be not only a *taking*, but a *carrying away*. The

LAPIER'S CAS. *taking* in the preſent caſe is very clearly proved; for the ear-ring was completely ſeparated from the ear: but it ſeems queſtionable whether there has been a ſufficient *carrying away*. A number of caſes have been decided upon this ſubject: two of them have come before Lord *Mansfield* ſince I have been upon the bench. One of them was a caſe reſerved by Mr. Juſtice *Nares*. A man got into a waggon where there was a bale of goods which lay in a horizontal poſture. He raiſed it perpendicularly on its end, and while he was taking the contents of it out, he was detected by the waggoner. The Judges were of opinion, That as the property had not been removed from the place where it at firſt laid, there was not a ſufficient carrying away. The other caſe was reſerved by myſelf (*a*). The Uxbridge waggon was paſſing along Oxford-ſtreet; and at a grocer's door, a parcel of ſugar or other grocery was taken up and put into the waggon. The priſoner got into the waggon, and had removed this parcel from the head of the waggon, where it had been originally placed, to the tail of it; but he was apprehended before he had got it out of the waggon. The Judges held That this was a ſufficient *taking and carrying away* to conſtitute the offence. There is a very leading caſe upon this ſubject in print: A man lodged at an Inn, and in the morning before it was light took the ſheets from off the bed in which he lay, *with an intent to ſteal them*, and carried them into the hall, where he left them, and went to the ſtable to get his horſe, where the hoſtler ſeized him; and it was adjudged to be larceny (*b*).

(*a*) See ante, p. 229. Coſlet's Caſe.

(*b*) 27 Aſſ. Pl. 59. Co. P. C. 108. 1 Hale, 508.

The

LAPIER'S CASE.

The Jury found the priſoner guilty; but the judgment was reſpited, and the caſe ſubmitted to the conſideration of the twelve Judges.

In July Seſſion following the priſoner was put to the bar, and informed by Mr. *Reynolds*, Clerk of the Arraigns, that his caſe had been conſidered by the Judges; and they were of opinion, That he was guilty of the felony charged againſt him in the indictment (*a*).

(*a*) At the Lent Aſſizes for Cambridge 16 Car. 2. *Clement Simpſon* was indicted on 39 Eliz. c. 15. for ſtealing in the dwelling houſe. A Special Verdict was found, that he had taken plate out of a trunk, and laid it on the floor, but was apprehended before he had carried it away: and all the Judges were of opinion, That taking goods and removing them from one place to another in the ſame houſe, with an intent to ſteal them, is felony; for by *the taking*, he hath the poſſeſſion. Kelynge, 31. Bro. Cor. 107. 1 Hale, 508. But in the caſe of *Edward Farrell*, who was indicted for robbery, O. B. July Seſſion 1787, it was found that the priſoner ſtopped the proſecutor as he was carrying a feather-bed on his ſhoulders, and told him to lay it down or he would ſhoot him. The proſecutor laid the bed on the ground; but before the priſoner could take it up ſo as to remove it from the ſpot where it lay, he was apprehended. The Judges were of opinion, That the offence was not completed, and the priſoner was diſcharged.

Ellor's Caſe.

CASE 130.

OLD-BAILEY May Seſſion 1784. This was an indictment on the ſtatute 7 Geo. 2. c. 22. for forging a certain order for the payment of money.

An order for the delivery of goods, to be within the meaning of 7 Geo. 2. c. 22. muſt be poſitive and compulſory.

ELLOR'S CASE.

"Meſſrs. *Songer*,

"Pleaſe to ſend Ten Pounds by the bearer, "as I am ſo ill I cannot wait on you.

"*Elizabeth Wery.*"

See Lockitt's Caſe, ante, 96.

The Court. The Act of Parliament means ſuch an order for the payment of money, as, if genuine, the party giving had a right to make; but this appears to be a mere letter, rather requeſting the loan of money than ordering the payment of it. The terms of it do not import any thing compulſory on the part of the drawee to pay it; and in the caſe of *Mary Mitchel*, (*a*), it was determined by nine Judges againſt one, That the order was not within the meaning of the Act, becauſe the direction of it was not poſitive, and the terms of it did not import that the party giving it had a right to the goods ordered.

(*a*) Foſter.

The priſoner was acquitted of *the felony*, but detained and convicted of the *miſdemeanor*.

CASE 131.

Peyton's Caſe.

Stealing from the Invalid Office at Chelſea. *Qu.* Whoſe houſe it muſt be laid to be?

OLD-BAILEY, May Seſſion 1784. This was an indictment on the ſtatute 12 Ann. c. 7. for ſtealing a gold watch, value fifty pounds, in the Dwelling-houſe of *William Henry Bunbury*, Eſq.

The

PEYTON'S CASE.

The houſe was the Invalid Office at Chelſea, which is an office under Government. The ground-floor of it was uſed by the Paymaſter-General for the purpoſe of conducting the buſineſs relating to the office. Mr. *Bunbury* occupied the whole of the upper part of it; but the rent and taxes of the whole houſe were paid by Government.

The Court (*a*) held, That this was not the dwelling-houſe of Mr. *Bunbury*; and the priſoner was acquitted of the capital part of the offence (*b*).

(*a*) Mr. Baron *Perryn* and Mr. Juſtice *Willes*.

(*b*) In Aug. 14. Car. 1. three perſons were indicted for breaking the lodgings of Sir *Henry Hungate* at Whitehall; and the Judges were of opinion, That it ſhould have been laid to be the King's manſion-houſe called Whitehall. 1 Hale, 522. 2 Hawk. P. C. 499. See alſo Cro. Car. 473. 1 Jones, 394. Cowper, 5.

At the O. B. October Seſſion 14 Car. 2. *Henry Burgeſs* was indicted for breaking up a chamber in Somerſet-houſe, and the indictment charged it to be *domus manſionalis* of the perſon who lodged in it; but it was agreed that the whole houſe belonged to the Queen-Mother, and therefore that the indictment was bad.

Pedley's Caſe.

CASE 132.

A Bankrupt committed on meſne proceſs; on an extent from the Crown; and under the Commiſſioners warrant, may be diſcharged *quoad* the commitment by the Commiſſioners, if they have miſtaken *improbable* anſwers for *unſatisfactory* ones; for if he is perjured, he may be indicted, though he has not ſworn *poſitively*, but only that he *believes*, &c.

IN the King's Bench, Trinity Term 1784, a writ of *Habeas Corpus*, directed to the Keeper of Briſtol gaol, had been procured to bring up the body of *William Pedley*, the defendant. On reading the return, it appeared that he was detained in cuſtody on three commitments. *Firſt*,

On

PEDLEY'S CASE. On an extent at the ſuit of the Crown. *Secondly*, On meſne proceſs to the amount of 10,000l. at the ſuits of ſeveral creditors. *Thirdly*, On a warrant by Commiſſioners of Bankrupts, for not duly conforming to the ſatisfaction of the ſaid Commiſſioners, touching the diſcovery and diſcloſure of his eſtate and effects.

Mr. *Cowper* moved that he might be diſcharged *quoad* the commitment by the Commiſſioners.

Mr. *Lawrence*, for the Commiſſioners. By the ſtatute 5 Geo. 2. c. 30. ſ. 16. if a bankrupt ſhall refuſe to anſwer, or ſhall not fully anſwer to the ſatisfaction of the Commiſſioners, all lawful queſtions put to him by the ſaid Commiſſioners, it ſhall be lawful for the ſaid Commiſſioners, by warrant under their hands and ſeals, to commit him to ſuch priſon as they ſhall think fit; there to remain without bail or mainprize, until he ſhall ſubmit and full anſwer make to the ſatisfaction of the Commiſſioners.

It appeared to the Commiſſioners at the laſt examination of the Bankrupt, that a ſhort time before the commiſſion iſſued, he had in his Banker's hands the ſum of 5000l. the whole of which he drew out, and left ſeveral of his acceptances which were then due unpaid. He was aſked to give a reaſon for his drawing the money out of his Banker's hands. He anſwered, "I drew it "out in order to aſcertain whether my Banker "would honor my drafts, when he had no mo-"ney of mine in his hands." He was then aſked, If he had afterwards drawn any drafts upon his Banker for this purpoſe? He anſwered, "No."

He

He was aſked, Why he did not try this experiment on his Banker, by drawing a draft at once upon him for a greater ſum than he had in his hands? To this queſtion he made no anſwer. He was aſked in what manner he diſpoſed of the money ſo drawn out. He anſwered, "I kept "it in my houſe, together with other monies "which I had collected elſewhere, amounting in "the whole to 7000l." He was aſked, Why he did not pay a bill which was then due? He anſwered, "I did not chuſe to part with the "money." He was aſked how the money was ultimately diſpoſed of? He anſwered, "A fire "happened, which burnt my houſe and con-"ſumed the money." He was aſked in what the money conſiſted. He anſwered, "I cannot "give you any other account than that which I "have already given." PEDLEY'S CASE.

On theſe anſwers he was committed by the Commiſſioners; but he ſubmitted to a ſecond examination (*a*): and on being again aſked why he drew the money out of the Banker's hands, he gave a different reaſon for it to that which he had before given, and ſtill perſiſted in refuſing to ſay in what the money conſiſted; he was therefore remanded.

(*a*) It is incumbent on the bankrupt to ſend word when he will ſubmit and anſwer the queſtions, *per Butler, Juſtice.* 1 Term Rep. 654.

He made his eſcape from the priſon; and on being retaken, he acknowledged that he had ſecreted the notes about him to the amount of 7000l. but that he had ſince deſtroyed them, for fear of being diſcovered.

Mr. *Cowper, for the priſoner.* Theſe anſwers, however inſufficient they may appear, are ſuch as the Commiſſioners were bound to receive as ſatisfactory.

PEDLEY'S CASE.

satisfactory. Their power extends only to cases where the bankrupt refuses to answer at all, or does not fully answer; and they cannot take upon themselves to decide whether the answers be true or false. If his answers be not true, he may be indicted for perjury, but they cannot commit him.

(a) Miller's Case, 3 Wilf. 427. 2 Black. 881.

There was a case (a) lately in the Common Pleas similar to the present. The Commissioners had committed a bankrupt for giving answers which they conceived were not satisfactory. They asked, whether a part of his property, which they specified, had been sold by himself or by a broker? He answered, "*I believe* I sold "them by a broker." They desired that he would speak positively, but he refused to answer in any other way than that *he believed*. And L. C. J. *De Grey* said it was a mistake which mankind had fallen into, that a person could not be convicted of perjury for deposing on oath according to his *belief*; and the bankrupt was discharged.

Lord *Mansfield*. It is certainly true, that a man may be indicted for perjury, in swearing that he *believes* a fact to be true, which he must know to be false. If a bankrupt swears fully and roundly, and the Commissioners have every reason to believe that what he swears is not true, yet they must take it to be satisfactory, provided that it would be satisfactory in case it were true. In the present case, every circumstance tends to shew that the bankrupt has sworn falsely. I am convinced he has perjured himself; but he has answered fully, and the Commissioners cannot commit

commit him for falſe ſwearing. He muſt therefore be diſcharged *quoad* the commitment of the Commiſſioners. PEDLEY'S CASE.

Sponſonby's Caſe. CASE 133.

OLD-BAILEY, July Seſſion 1784, *John Sponſonby* was indicted for forging an indorſement in the name of *William Pearce* on a bill of exchange, *purporting* to be drawn by *Richard Davis*, in favour of *William Pearce*, on *Meſſrs. Crofts and Co.* for the ſum of four guineas, with intention to defraud, FIRST, *Meſſrs. Crofts and Co.* and SECONDLY, one *John Churchill*. What ſhall be conſidered inſufficient evidence in forgery.

There were alſo other counts for uttering the ſaid bill, knowing the *indorſement* to be forged, with the like intention to defraud.

It appeared in evidence, that the priſoner had gone to *Meſſrs. Crofts and Co.* Bankers in Pall-Mall, and on receiving the four guineas, wrote the name "*John Churchill*" on the back of the bill, by way of witneſſing the receipt of the money; the name "*William Pearce*" being then indorſed thereon.

William Pearce, the ſuppoſed payee, was an intimate acquaintance of *Richard Davis* the drawer; and had received a letter of advice, ſignifying that ſuch a bill, together with a bank-note, had been remitted to him; and deſiring him as an act of friendſhip, to pay their produce over in diſcharge

SPONSONBY'S CASE.

diſcharge of a debt which *Davis* owed to one *Coles*. The bill never having come into *Pearce's* hands, he conſequently had no property in it; and having no demand on *Davis* the drawer for its amount, it was agreed that he was a competent witneſs to prove that the indorſement "*William Pearce*" was not his hand-writing. But it was neceſſary firſt to ſhew, that he was the identical *William Pearce* to whom the bill was made payable; and as the teſtimony of *Davis* the drawer was the beſt evidence of that fact, and he was not preſent to atteſt it, the letter of advice which *Pearce* had received from him was held inſufficient for the purpoſe; and therefore his teſtimony to ſhew that the indorſement was forged was rejected: for although it might not be *his* hand-writing, yet it might be the hand-writing of a *William Pearce;* or, as he had not been proved to be the perſon intended as the payee of the bill, it might be the hand-writing of the *William Pearce* to whom the bill was made payable.

The priſoner was accordingly acquitted on this indictment.

Stone's Caſe.

CASE 134.

OLD-BAILEY, July Seſſion 1784. This was an indictment on the ſtatute 10 and 11 Will. 3. c. 23 for privately ſtealing a watch, the property of Sir *Robert Heſkett*, in the ſhop of *John Alcock*.

What ſhall be conſidered *a ſhop*, &c. within the 10 and 11 Will. 3. c. 23.

Sir *Robert Heſkett* had ſent this watch to his watch-maker Mr. *Alcock*, for the purpoſe of being repaired, and it hung in the ſhew-glaſs in Mr. *Alcock*'s ſhop at the time it was ſtolen.

The Court ſaid, that the meaning of the Act of Parliament upon which the capital part of the indictment was founded, had always been reſtrained to ſuch goods only, as are expoſed to ſale in ſhops; and did not extend to mere *repoſitories* for goods, although they might appear in the nature of *ſhops*; and that as Mr. *Alcock*'s ſhop was not, with reſpect to this watch, *a place of ſale*, but a mere *repoſitory*, the priſoner ought to be acquitted of the capital part of the charge. The Jury accordingly found him guilty of the ſimple larceny only, and he was tranſported for ſeven years. See *Howard*'s *Caſe* in *Foſter*'s *Reports*.

George

CASE 135. ## George Drummond's Caſe.

The declaration of a convict at the moment of execution, cannot be given in evidence as the declaration of a dying man; for being attainted, his *vivâ voce* teſtimony could not have been received on oath.

AT the Old Bailey, in September Seſſion 1784, *George Drummond* was indicted before Mr. Baron *Eyre*, preſent Mr. Juſtice *Gould*, for robbing the *Earl of Claremont* of a gold watch, chain, ſeals, and trinkets.

During the trial, the priſoner's Counſel informed the Court, that a young man of the name of *Edwards*, very much reſembling the perſon of the priſoner, had been recently executed for a highway robbery, and that immediately previous to the awful moment of his fate, he had communicated *ſomething* to the Rev. Mr. *Villette*, the chaplain in ordinary of the priſon, touching the commiſſion of the identical robbery then under conſideration. He therefore ſubmitted to the Court, that as Mr. *Villette*'s knowledge upon this ſubject had proceeded from *the ſolemn declaration of a dying man*, it was admiſſible evidence in favour of the priſoner.

The Court. It would be inconſiſtent with the rules of evidence, which are rules of juſtice, to examine a witneſs to the declaration of a perſon dying under the circumſtances deſcribed. The principle upon which this ſpecies of evidence is received, is, that the mind, impreſſed with the awful idea of approaching diſſolution, acts under a ſanction equally powerful with that which it is preſumed to feel by a ſolemn appeal to God upon an oath. The *declarations* therefore of a perſon dying under ſuch circumſtances, are conſidered as equivalent to the *evidence* of the living witneſs upon

upon oath. But to examine a witneſs to the declarations of an attainted convict, would be carrying the rule of evidence beyond its poſſible extent, even if the perſon were alive; for as an attainted convict, he could not have been admitted to give teſtimony upon oath, and the dying declarations of ſuch a perſon cannot, conſiſtently with the principles of juſtice, be conſidered as better evidence than his teſtimony on oath would have been if he had been alive. The fact, however, that a man reſembling the perſon of the priſoner was executed, may be given in evidence, provided it is confined within ſuch time as to make it probable that he was the perſon who committed this robbery. DRUMMOND'S CASE.

The priſoner's Counſel did not venture to call any witneſſes to eſtabliſh that fact; and the jury found the priſoner guilty.

Elizabeth Thompſon's Caſe.

CASE 136.

AT the Old Bailey, September Seſſion 1784, *Elizabeth Thompſon* and *Mary Macdaniel* were indicted on the 12 Ann. c. 7. for ſtealing ſeven guineas, the monies of *Thomas Clifford*, in the dwelling-houſe of the *ſaid Mary Macdaniel*.

The penalties on ſtealing in a dwelling houſe, do not extend to the caſe of a priſoner ſtealing the property of another in his *own* dwelling houſe.

The ſtatute recites, "Foraſmuch as divers "wicked and ill-diſpoſed *ſervants* and other per- "ſons are encouraged to commit robberies in "houſes, by the privilege of demanding the be- "nefit of their clergy;" and therefore enacts, "That

THOMPSON'S CASE.

"That all and every perſon or perſons that ſhall "feloniouſly ſteal any money, goods or chattels, "wares or merchandizes, of the value of forty "ſhillings or more, being in any dwelling-houſe "or out-houſe thereunto belonging, although "ſuch houſe or out-houſe be not actually "broken by ſuch offender, and although the "owner of ſuch goods, or any other perſon or "perſons be or be not in ſuch houſe or out-houſe, "or ſhall aſſiſt or aid any perſon or perſons to "commit any ſuch offence, ſhall be debarred "from the benefit of clergy."

It appeared in evidence, that the houſe in which the *larceny* was committed, was in fact the houſe of *Mary Macdaniel*; and the Court held, that the meaning of the Legiſlature did not extend to the caſe of a perſon ſtealing in his own houſe.

CASE 137.

Hutchinſon's Caſe.

The ſubſtantive clauſes of the Smuggling Act enumerated. There muſt be a *deliberate* aſſembling to bring the offenders within the penalty of the ſtatute.

AT the Old Bailey, September Seſſion 1784, *William Hutchinſon*, *Thomas Lewis*, and *Daniel Wilkinſon*, were tried before Mr. Baron *Eyre*, preſent Mr. Juſtice *Gould*, on the ſtatute 19 Geo. 2. c. 34. upon an indictment containing three counts.

The *firſt count* charged, that the priſoners, with divers other perſons, with fire-arms, and other offenſive weapons, feloniouſly did aſſemble themſelves together, *in order* to be aiding and aſſiſting in

in reſcuing and taking away from *W. T.* and *C. S.* two of the Officers of the Exciſe, in the due execution of their office, 150 gallons of foreign geneva, being uncuſtomed goods (*a*), and liable to pay duties, &c. after ſeizure of the ſame by the Officers of the Exciſe as aforeſaid. HUTCHINSON'S CASE.

(*a*) See Shelley's Caſe, July Seſſion, 1784.

The *ſecond count* charged, that, being thus aſſembled, they aſſaulted the Officers of the Exciſe in the due execution of their office.

The *third count* charged, that they hindered, obſtructed, oppoſed, and reſiſted the Officers, &c.

The Officers of Exciſe, in conſequence of an information, went to ſearch *Hutchinſon*'s houſe, where they found a quantity of geneva in tubs concealed in a vault under the yard. Two of the priſoners ſtruck the Officers, beat them from the vault after they had entered it, and prevented them from taking the tubs away. The Officers went in ſearch of Conſtables and other aſſiſtance; but on their return, twelve or fourteen people had come drunk from an adjacent ale-houſe, and were carrying ſome of the tubs away. There was a great noiſe and riot, many brick-bats were thrown at the Officers, and one of them was knocked down and wounded, but the Smugglers were not ſeen to uſe any offenſive weapon.

The ſtatute upon which the preſent indictment is founded contains five branches.

First,

HUTCHINSON'S CASE.

First, it enacts, "That if any perſons, to the "number of three or more, armed with fire-"arms or other offenſive weapons, ſhall be aſ-"ſembled in order to be aiding and aſſiſting in "the illegal exportation of goods prohibited to "be exported, or the carrying off ſuch goods in "order to ſuch exportation, or in running, land-"ing, or carrying away prohibited or uncuſtom-"ed goods, or goods liable to pay any duties, "which have not been paid or ſecured, or in the "illegal relanding of any goods whatſoever which "have been ſhipped or exported upon deben-"ture or certificate, or in reſcuing or taking "away the ſame, after ſeizure, from any Officer "or Officers of the Cuſtoms or Exciſe, or other "his Majeſty's revenue, or other perſon or per-"ſons employed by him or them, or aſſiſting him "or them, or from the place where they ſhall "be lodged by him or them, or in reſcuing any "perſon who ſhall be apprehended for any of the "offences made felony by this or any other Act "relating to the revenues of Cuſtoms or Exciſe, "or in preventing the apprehending any perſon "who ſhall be guilty of any ſuch offence, every "perſon ſo offending ſhall ſuffer death without "the benefit of clergy.

Secondly, "Or in caſe any perſons to the num-"ber of three or more, ſo armed as aforeſaid, "ſhall be ſo aiding or aſſiſting, they ſhall ſuffer "death without benefit of clergy."

Thirdly, "Or if any perſon ſhall have his face "blacked, or wear any vizard, maſk, or other "diſguiſe when paſſing with ſuch goods:"

Fourthly,

Fourthly, " Or ſhall forcibly hinder, obſtruct, " aſſault, oppoſe or reſiſt any of the Officers of " the Cuſtoms or Exciſe, or others his Majeſty's " revenue, in the ſeizing or ſecuring any ſuch " goods:" HUTCHINSON'S CASE.

Fifthly, " Or if any perſon or perſons ſhall " maim or dangerouſly wound any Officer of the " Cuſtoms or Exciſe, or any other his Majeſty's " revenue, in his attempting to go on board any " ſhip or veſſel within the limits of any of the " ports of this kingdom, or ſhoot at, maim, or " dangerouſly wound him when on board ſuch " ſhip or veſſel, and in the due execution of his " office or duty; then every perſon ſo offending " ſhall be adjudged guilty of felony, and ſhall " ſuffer death without benefit of clergy."

The Court. The *third* branch of the Act of Parliament apparently has no regard to the number of perſons, nor to their being armed with offenſive weapons; and therefore an individual, paſſing *diſguiſed* with uncuſtomed goods, would in all probability be deemed within the penalties of the Act. The *fourth* branch alſo, being coupled by the word OR to the preceding ſentence, ſeems to be a clauſe that would reach any individual who ſhall forcibly hinder or obſtruct a Revenue-Officer in the execution of his duty. On this clauſe the third count in the preſent indictment is founded, and undoubtedly there is evidence to prove the fact; but by the ſtatute of 19 Geo. 3. c. 69. ſ. 10. this offence is reduced to a miſdemeanor, puniſhable by corporal puniſhment, and the felony thereby virtually repealed. This point was ſettled by the twelve Judges, in the caſe of *the King v. Davis*, reſerved by Mr. Juſtice *Gould*

See the concurrent opinions of Mr Juſtice *Willes* and Mr. Baron *Perryn*, in the caſe of *Cornelius Roſe*, May Seſſion 1784.

HUTCHINSON'S CASE.

from the Home Circuit *(a)*. The ſecond count does not appear to be ſupported by any of the clauſes in the ſtatute; and on the firſt count, which is framed on the firſt branch of the Act, there does not appear to be ſufficient evidence to convict the priſoners. To bring offenders within the penalties of this clauſe, they muſt be armed with offenſive weapons *(b)*; and the aſſembling muſt be deliberate, and for the expreſs purpoſe of aſſiſting in the reſcue of the goods *(c)*. In the preſent caſe it is quite the reverſe. A ſet of drunken fellows come from an ale-houſe, and haſtily

(a) Vide, ante, p. 252

See the caſe of Thomas Gray, July Seſſ. 1786. who was acquitted upon the authority of this opinion.

(b) In B. R. Trinity Term, 15 Geo. 2. it appeared in a ſpecial verdict on an indictment for this offence, that all the company had *fire-arms*, except the defendant, who had only a *common horſe-whip*; and the Court ſo ſtrongly inclined that the defendant was not guilty, that the Attorney or Solicitor General declined to argue it; for the Act muſt be taken ſtrictly; and it is a material circumſtance in each man's caſe, that he ſhall be *armed* with an *offenſive weapon*. 2 Strange, 1166. *Fletcher's Caſe*.—At O. B. May Seſſion 1784, Mr. Juſtice *Willes* and Mr. Baron *Perryn* inclined to think a perſon catching up a *hatchet* accidentally, during the hurry and heat of an affray, was not being armed with an *offenſive weapon* within the meaning of this Act. *The Caſe of Cornelius Roſe*. At the O. B. February Seſſion 1785, large ſticks, about three feet long, with large knobs at the end, with ſeveral prongs, the natural growth of the ſtick, ariſing out of them, were held not to be offenſive weapons; and the Court (Mr. J *Gould*, Mr B. *Perryn*, and Mr. *Recorder*) ſaid, on reading the preamble of the ſtatute, that they muſt be ſuch weapons as the law calls *dangerous weapons*. *Ince's Caſe*.—And in the Caſe of *George Coſans*, O. B. May Seſſion 1785, it was contended, upon the authority of *Ince's Caſe*, that very large club ſticks, ſuch as people ride with to defend themſelves, are not offenſive weapons; and on its being left to the Jury, the priſoner was acquitted: but the Court ſaid, that although it was difficult to ſay what ſhould or ſhould not be called an offenſive weapon, it would be going a great deal too far to ſay, that nothing but guns, piſtols, daggers, and inſtruments of war ſhould be ſo conſidered; but that bludgeons, properly ſo called, clubs, and any thing that is not in common uſe for any other purpoſe but a weapon, are clearly offenſive weapons within the meaning of the Legiſlature.

(c) O. B. December Seſſion 1785, Mr. Juſtice *Willes* and Mr. Baron *Hotham* adopted the ſame opinion, and the priſoner was acquitted. *The Caſe of B. Spice*.—And at July Seſſion *Thomas Gray* was tried before Mr. Juſtice *Heath*, and acquitted upon the ſame conſtruction of the ſtatute.

ſet

ſet themſelves to carry away the geneva, but whether with arms or without is not proved. It ſeems very queſtionable, whether the object of the Legiſlature extends to the preſent caſe. The goods are found concealed in a vault; and the words of the ſtatute manifeſtly allude to the circumſtance of great multitudes of perſons coming down upon the beach of the ſea, for the purpoſe of eſcorting uncuſtomed goods to the places deſigned for their reception. HUTCHINSON'S CASE.

The Court offered Mr. Attorney General a ſpecial verdict upon this caſe; but he declined to take it, and the priſoners were acquitted.

Holland Palmer's Caſe.

CASE 138.

AT the Old Bailey, December Seſſion, 1784, *Holland Palmer* was convicted before *James Adair*, Eſq; Recorder, on the ſtatute 23 Geo. 3. c. 49. ſ. 20. for utter 1000 pieces of paper with a counterfeit ſtamp thereon; but a queſtion of law aroſe upon the conſtruction of the ſtatute, and the caſe was ſubmitted to the conſideration of the twelve Judges.

All paper, upon the face of which there is a mark reſembling the *ſtamp* required by the 23 Geo. 3 c. 49 ſ. 20. impoſing a ſtamp-duty on receipts, ſhall be conſidered as "*ſuch as is liable to the ſaid duties.*"

The Statute, ſect. 3. enacts, "That for every "piece of paper, upon which any receipt or other "diſcharge given for the payment of money "amounting to Two Pounds, and not amounting to the ſum of Twenty Pounds, ſhall be "ingroſſed, written, or printed, there ſhall be "charged a ſtamp-duty of two-pence." And by

PALMER'S CASE.

the thirteenth ſection the Commiſſioners of the Stamp-Duties are impowered " to uſe and pro-
" vide ſuch ſtamps for the ſaid duties as ſhall be
" requiſite in that behalf." It is alſo enacted by ſection 20. " That if any perſon ſhall counterfeit
" or forge, or procure to be counterfeited or forg-
" ed any ſtamp, or mark directed or allowed to
" be uſed by this act for the purpoſe of denoting
" the duties aforeſaid, with intent to defraud his
" Majeſty, or ſhall fraudulently uſe any of the ſaid
" ſtamps or marks with the like intent, or ſhall
" *utter*, vend, ſell, or expoſe to ſale, *any paper*
" *liable to the ſaid duties*, with any counterfeit
" mark or impreſſion thereon, knowing the ſame
" to be counterfeited, ſuch perſon ſhall ſuffer
" death without benefit of clergy."

The Indictment alſo, purſuing the ſtatute, charged, That a certain ſtamp was provided and uſed for ſtamping and marking every piece of paper upon which any receipt or other diſcharge given for the payment of money amounting to Two Pounds, and not amounting to Twenty Pounds, ſhould be written or printed with a ſtamp of two-pence: AND THAT *Holland Palmer*, intending to defraud his Majeſty of ſuch right or duty, did *utter* and expoſe to ſale, to one *Hannah Gabriel*, 1000 pieces of *papers liable to the ſaid duties* of two-pence, reſembling the impreſſion of the ſtamp then and there uſed in purſuance of the ſaid ſtatute, well knowing the ſaid impreſſions to be counterfeit.

The Objection aroſe upon the words " *papers*
" *liable to the ſaid duties*," which, it was contended, were entirely void of the preciſe ſenſe and

and definition to which they were applied; and incapable of any conſtruction within the poſſible intention of the Legiſlature upon this ſubject.

On the ninth of Hilary Term 1785, all the Judges, except L. C. Baron *Skynner* and Mr. Baron *Hotham*, who were indiſpoſed, aſſembled at Lord *Mansfield*'s Chambers; and the queſtion was very fully and elaborately diſcuſſed.—On the firſt day of the February Seſſion following, the reſult of the conference was delivered to this effect by

Mr. Juſtice *Gould*. The objection ariſes upon a ſuppoſed inaccuracy of the words in the ſtatute, "paper liable to the ſaid duties;" which words the preſent indictment has purſued in the *plural number*, although *a duty* of one deſcription only is mentioned: but the Judges are of opinion, that the indictment is properly drawn, and that in this and in every other reſpect it contains all the ingredients required by the Act. But the material queſtion is, What the Legiſlature meant by the words "*paper liable to duties?*" and it was ſaid, that as one particular piece of paper cannot be *liable* to any of the duties more than another, it would follow that all the writing-paper in the world, whether manufactured in *England* or at *China*, might be conſidered as "paper *liable* to duties;" and every utterer or ſeller of paper of any deſcription indicted for a capital offence, in having expoſed to ſale "paper *liable* to the ſaid duties." In anſwer to this ſuggeſtion, all the Judges are of opinion, that upon a due attention to the preſent ſtatute, and the ſtatute 24 Geo. 3. c. 7. paſſed in the ſucceeding Seſſion upon the ſame ſubject, it will appear that the

PALMER'S CASE.

the words "*paper liable to the ſaid duties*" are capable of a clear and unequivocal meaning. There are two rules by which the expreſſions of the Legiſlature are to be interpreted. Firſt, If any part of an Act of Parliament is penned obſcurely, and other paſſages in the ſame Act will elucidate that obſcurity, recourſe ought to be had to ſuch context for that purpoſe. Secondly, If there are ſeveral Acts upon the ſame ſubject, they are to be taken together as one ſyſtem, and as interpreting and enforcing each other. By adopting theſe rules in the preſent caſe, it will appear that the words "*paper liable to the ſaid du-*" "*ties*," are not to be taken in the large and indefinite ſenſe which was attempted to be impoſed upon them; but that they mean diſtinctly ſuch pieces of paper as are *deſtined* or *prepared* for the uſes mentioned in the ſtatute. The ſtatute, by ſect. 14. deſcribes the paper liable to duties to be that paper "upon which any receipt or other "diſcharge for the payment of money ſhall be "written; which before the ſame ſhall be writ-"ten," is ordered to be brought to the Stamp-Office to be ſtamped. And by 24 Geo. 3. c. 7. ſ. 8. no paper required to be ſtamped by this ſtatute ſhall be permitted to be ſtamped at any time after the ſame ſhall have been written, unleſs on the payment of Ten Pounds. The paper thus deſtined and prepared for the uſe of writing receipts thereon, is the paper meant by the words "paper *liable* to the ſaid duties;" and therefore all paper upon the face of which a mark appears reſembling the mark which the Act requires, is evidently paper liable to the duties, becauſe the preparation of thus marking it diſcovers the purpoſe for which it is deſigned. Upon the papers mentioned in the indictment, there appears a falſe

falſe ſtamp or impreſſion, reſembling the true ſtamp which the law requires for receipts: this diſcovers the uſe for which they were deſtined and prepared, and brings them within the general words of the Act, "*paper liable to the ſaid du-*"*ties.*" And the Judges are therefore unanimouſly of opinion, that the priſoner was properly convicted. PALMER'S CASE.

In January Seſſion 1785, *Ann Jones* was convicted at the Old Bailey on the ſame ſtatute; but her judgment was reſpited until the above determination was known.

Both the priſoners received ſentence of death.

Alexander Fiſher's Caſe. CASE 139.

OLD-BAILEY January Seſſion 1785, the priſoner was indicted before Mr. Juſtice *Heath*, for burglariouſly breaking and entering the dwelling-houſe of *Benjamin Ward*, and ſtealing therein Four Gold Watches of a conſiderable value: to which indictment he had pleaded *Not Guilty*. A priſoner cannot be convicted on the ſingle, uncorroborated evidence of his own confeſſion.

The proſecutor proved, that the burglary had been committed, and that the watches were ſtolen; but there was no evidence whatever to bring the charge home to the priſoner, except a confeſſion of the fact, which he had freely and voluntarily made before a Juſtice of the Peace on his examination, but it was not reduced into writing.

The

FISHER'S CASE. The Court. It is an eſtabliſhed rule of law, that the mere confeſſion of a crime, without any one ſingle circumſtance to corroborate it, is not ſufficient to convict a priſoner, unleſs he ſhould again confeſs the fact, by pleading *Guilty* to the indictment.

CASE 140. ## Gibſon, Mutton, and Wiggs's Caſe.

Burglary. AT the Surrey Lent Aſſizes 1785, for *Kingſton*, the priſoners were convicted before Mr. Baron *Perryn*, for burglary in the dwelling-houſe of *T. S.* and ſtealing goods therein the property of *John Hill*.

It appeared in evidence, that there was a ſhop built cloſe and adjoining to the dwelling-houſe mentioned in the indictment; but there was no internal communication whatever between the houſe and ſhop, and no perſon ſlept in the ſhop. The only door to the ſhop was in the court-yard before the houſe and ſhop, which court-yard was incloſed by a brick wall three feet high. In the wall was a wicket which ſerved as a communication to both the houſe and ſhop. The burglary was committed in the ſhop. The *ſhop* was let by *J. S.* to *John Hill*, together with ſome apartments in the *dwelling-houſe*, from year to year, at ſix guineas *per annum*.

It was objected by the Counſel for the priſoner, that the ſhop could not be conſidered as any part of the dwelling-houſe of *T. S.*; and upon this

this objection the judgment was reſpited, and the caſe reſerved for the opinion of the twelve Judges. GIBSON, MUTTON & WIGGS's CASE.

Mr. Baron *Eyre*, at the Summer Aſſizes for the ſame county at Croydon 1785, ordered the priſoners to the bar; and informed them, that the Judges had conſidered of this caſe, and that they were unanimouſly of opinion, it was a proper conviction. See Garland's caſe, ante, 145.

The priſoners received ſentence of death, and were executed purſuant to ſuch ſentence.

John and Patrick Welch's Caſe. CASE 141.

AT the Lent Aſſizes for the County of Hertford, in the year 1785, *John Welch* and *Patrick Welch* were indicted, for that they "one "piece of falſe, feigned, and counterfeited mo- "ney and coin *to the likeneſs and ſimilitude of the* "*good, legal, and current money and ſilver coin of* "*this realm called a Shilling*, falſely and deceit- "fully, felonioufly and traitorouſly did forge, "counterfeit, and coin." There was a ſecond count in like manner for coining *a Sixpence*.

A counterfeit ſhilling produced in evidence, although it is quite ſmooth, and no impreſſion of any ſort diſcernible on it, will ſupport an indictment for counterfeiting to the *ſimilitude* of the legal coin, &c.

It appeared in evidence, that every implement neceſſary for coining ſhillings and ſixpences were found under the floor of the room where the priſoners were apprehended; and one of the priſoners was found at work upon a piece of baſe metal. Several counterfeit ſhillings and ſixpences were

JOHN and PATRICK WELCH's CASE.

were alſo found in the room, and in the priſoners pockets, in a ſtate fit for circulation; and it was proved, that ſome of the ſame kind with thoſe found had in fact been circulated. But no impreſſion of any ſort or kind was diſcernible upon thoſe produced in evidence.

1 Hale, 184, 215. 5 Bac. Abr. 129.

Mr. *Hunter*, the priſoners Counſel, ſubmitted to the Court, that this evidence would not ſupport the indictment, becauſe it had not been proved, that the ſuppoſed counterfeit ſhillings and ſixpences had any impreſſion on them; and therefore they were not counterfeited to *the likeneſs and ſimilitude of the good and legal coin of the realm.*

Mr. Baron *Perryn* thought there was nothing ſubſtantial in the objection, and the Jury found the priſoners *Guilty;* but as Mr. *Hunter* preſſed him to reſerve the point, the judgment was reſpited, and the caſe referred to the conſideration of the twelve Judges; and they were unanimouſly of opinion, that the conviction was right (*a*).

(*a*) At the Old Bailey, in October Seſſion 1783, *Samuel Wilſon* was indicted for the like offence before Mr. Baron *Eyre*, and the counterfeited coin produced in evidence was round pieces of metal, quite ſmooth, and without the veſtige of an impreſſion on either ſide. The ſame objection was taken by the priſoner's Counſel; but his Lordſhip was clearly of opinion, that ſmooth blanks made like thoſe pieces of the *legal coin* which are ſuffered to remain in circulation, though the impreſſion they once had is totally effaced by time, may be conſidered as ſufficiently partaking of the reſemblance and ſimilitude of the *current coin* of this realm, to bring the maker of them within the penalties of the ſtatute; ſuch ſmooth blanks having a *reaſonable* likeneſs and ſimilitude to the coin which time has ſo defaced, and which yet ſo paſſes in circulation. But ſee *Varley's Caſe*, 2 *Black. Rep.* 682, and ante, p. 75.

Mary

Mary Jones and Henry Palmer's Caſe. CASE 142.

OLD-BAILEY April Seſſion 1785. This was an indictment for forging an indenture of apprenticeſhip, and alſo a receipt for money, with intent to defraud *A. B. C. D.* &c. *the Stewards of the Feaſt of the Sons of the Clergy.*

Forgery with intent to defraud the *Stewards of the Feaſt of the Sons of the Clergy*, is within the ſtatutes which make forgery a capital offence.

The charitable fund of the Sons of the Clergy is raiſed by voluntary contributions, and allotted by the Secretary equally among all the Stewards, to be diſpoſed of by them to the Widows and Children of deceaſed Clergymen, as they ſhall find objects worthy of relief. The priſoner *Mary Jones* was a Clergyman's Widow; and pretending, by means of theſe indentures, and the receipt indorſed thereon, that ſhe had placed her ſon as an apprentice, ſhe obtained, in concert with the other priſoner, an order from one of the Stewards on the Treaſurer of the Society, to pay her the ſum of 20l. as the apprentice-fee. The forgeries were very clearly proved, and the priſoners were found *Guilty*.

But their Counſel ſubmitted to the Court, that the fund from which this money had been obtained, was not among any of thoſe ſpecies of property which the Legiſlature had hitherto interpoſed to protect from the dangers of forgery by capital puniſhment; and that it remained, as at common law, a miſdemeanor only. Mr. Knowlys.

The Court (*a*). God forbid that the funds for public charities ſhould not receive the ſame protection which the law affords to the private purſe (*a*) Mr. Baron Eyre.

JONES and PALMER'S CASE.

purſe of every individual. The definition of forgery is, "the falſe making an inſtrument, which "purports on the face of it to be good and valid "for the purpoſes for which it was created, with "a deſign to defraud any *perſon* or *perſons*." A Corporation is a *body politic;* and to prevent a doubt, whether the aggregate members of ſuch a *body* were included under the words *perſon or perſons*, the ſtatutes of 31 Geo. 2. c. 22. ſ. 78. and 18 Geo. 3. c. 18. were made; for where there is an incorporation, the money becomes the property of the whole body, and not of the individual members who compoſe it. But in the preſent caſe, the ſeveral ſtewards are the abſolute owners of their reſpective ſhares of the fund: it is their money; it is put into their hands upon a truſt; and if they were to ſink it improperly, or to pay it wrongfully, they would perhaps be anſwerable; but, except as againſt the ſubſcribers, it is unqueſtionably their money as againſt all the world.

The priſoners received judgment of death.

Thomas

Thomas Field's Caſe.

CASE 143.

OLD-BAILEY May Seſſion 1785. This was a caſe reſerved by Mr. Serjeant *Adair*, Recorder, for the opinion of the twelve Judges.

Quære, If a perſon who takes ſome of the ſtamps off a writ, and fixes them to another writ of the ſame kind, and then ſells it for the purpoſe of its being *uſed* by ſuch perſons as might buy it from his vendee, is within the 12 Geo. 3. c. 48.

The Legiſlature, by the ſtatutes cited in the margin (*a*), has impoſed five ſixpenny ſtamp duties upon every piece of parchment or paper upon which any original writ (except ſuch original on which a writ of *capias* iſſues) *ſubpœna*, *bill of Middleſex*, *latitat*, &c. that ſhall iſſue out of, or paſs the ſeals of any Court, holding plea of forty ſhillings.

By the ſtatute 12 Geo. 3. c. 48. "If any "perſon or perſons ſhall write or ingroſs, or "cauſe to be written or ingroſſed, either the "whole or any part of any writ, &c. in reſpect "whereof any duty is or ſhall be made payable "in that behalf, or the whole or any part of any "piece of parchment or paper whereon there "ſhall have been before written any other writ, "&c. in reſpect whereof any duty is or ſhall be "payable as aforeſaid, before ſuch parchment or "paper ſhall have been again marked or ſtamped "according to the ſaid Acts:—or ſhall fraudu-"lently eraſe or ſcrape out, or cauſe to be eraſed "or ſcraped out, the name or names of any per-"ſon or perſons, or any ſum, date, or other "thing written in ſuch writ, &c. as aforeſaid:

(*a*) Vide page 326.

"—or

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" —or *fraudulently cut, tear, or get off, any mark* " *or ſtamp, in reſpect whereof, or whereby, any* " *duties are or ſhall be payable, or denoted to be* " *paid or payable as aforeſaid, from any piece* " *of parchment or paper, with intent to uſe ſuch* " *ſtamp or mark for any other matter, writing, or* " *thing, in reſpect whereof any ſuch duty is, or ſhall* " *be payable, or denoted to be paid or payable as* " *aforeſaid;* every perſon ſo offending in any of " the particulars before-mentioned, and every " perſon knowingly and wilfully aiding, abet- " ting, or aſſiſting any perſon to commit any ſuch " offence, ſhall be guilty of felony, and be tran- " ſported for ſeven years."

On theſe ſtatutes the priſoner was indicted, for that he having in his poſſeſſion a *bill of Midd eſex*, on which there was a certain ſtamp, denoting that the duty of ſixpence (*a*), ſixpence (*b*), ſixpence (*c*), and ſixpence (*d*), had been duly paid, did fraudulently and feloniouſly take off the ſaid ſtamps, with intent to uſe them on another *bill of Middleſex*, the duties on the ſame being then due and owing to the King.

(*a*) 5 Will. 3. c. 21.
(*b*) 9 & 10 Will. 3. c. 25.
(*c*) 12 Geo. 1. c. 33.
(*d*) 32 Geo. 2. c. 35.
And by 23 Geo. 3. c. 58. another duty of ſixpence is impoſed.

There was a ſecond count, charging him with having tranſpoſed the ſtamps from one *writ of latitat* to another; and both counts laid the offence to have been committed with intent to defraud the King.

It appeared in evidence, that there are two dies kept at the Stamp-Office, for the purpoſe of ſtamping *bills of Middleſex* and *latitats;* the one denoting the four ſixpenny duties impoſed by the ſtatutes mentioned in the margin; the other denoting

noting an additional ſixpenny duty impoſed by the ſtatute 23 Geo. 3. c. 58. and that ſince the paſſing of this laſt Act, all *bills of Middleſex*, and *latitats*, which have been ſtamped at the Stamp-Office, have been impreſſed with both the dies denoting the payment of the five ſixpenny duties. FIELD'S CASE.

The priſoner, a bailiff's follower, had ſerved one *Samuel Higgins* with a copy of a *bill of Middleſex*, and had afterwards ſold to one *Fryer*, a law-ſtationer, two blank *bills of Middleſex*, and one blank *latitat*, to which were affixed two ſtamps; one denoting that four ſixpenny duties had been paid, and another denoting that one ſixpenny duty had been paid; and it was poſitively ſworn that theſe two ſtamps had been tranſpoſed from other writs of the ſame kind. Several old writs, and among them the *bill of Middleſex* with the copy of which he had ſerved *Higgins*, with the ſtamps taken off, were found in his lodgings; but no proof could be given that the ſtamps which were taken from theſe writs had been legally ſtamped at the Stamp-Office.

Upon theſe facts, the Counſel for the priſoner ſubmitted the following points to the Court.

Firſt, The indictment charges the priſoner with having in his cuſtody a *proceſs* of our Lord the King, &c. which appeared to have been before then *duly iſſued* againſt *Samuel Higgins* and *Richard Roe*; and ſuch a writ is indeed produced; but it has not been proved that any ſuch writ was ever legally ſtamped at the Stamp-Office, or that it *duly iſſued*; and it is called a *proceſs*, a term of which

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which no mention whatever is made in the Act of Parliament on which the indictment is founded.

Secondly, The indictment charges the priſoner with having taken off a ſtamp denoting that *four ſixpenny* duties had been paid, *with intent* to affix them to another writ, for the purpoſe of defrauding the King; but the evidence is, that he took off *five ſixpenny ſtamps:* and as it appears that there muſt be the *five ſtamps* to effect the fraud, the offence in the Act of Parliament is not deſcribed by the charge in the indictment, that he tranſpoſed four ſixpenny ſtamps only.

Thirdly, The only evidence to affect the priſoner is his ſelling the writs to Mr. *Fryer;* but the ſtatute is ſilent as to uttering, vending, or expoſing to ſale: and in ſo penal a caſe as this, it would violate all the known rules of conſtruction to ſay, that this *ſale* was made with an *intent to uſe* the ſtamp in the manner which the Act deſcribes.

Theſe objections were anſwered by the Counſel for the Crown; and the learned Judge left it with the Jury to conſider, *Firſt*, Whether the *bill of Middleſex* againſt *Higgins* was ever legally ſtamped? *Secondly*, If it was, whether the priſoner ever took off that ſtamp? *Thirdly*, If he did, whether he took it off with intention to uſe it on a *bill of Middleſex* or a *latitat?* And *fourthly*, If they thought the priſoner guilty, whether he took the ſtamp off and ſold it with intention that it ſhould be uſed by himſelf or others, for the purpoſes ſtated in the indictment.

The

The Jury found the priſoner guilty; that "he "took off the ſtamp from the *bill of Middleſex* "mentioned in the indictment, and affixed it to "a piece of parchment, purporting to be another "proceſs of the ſame kind, which he ſold with "others to *Fryer*, with intent that the ſame "ſhould be uſed by ſuch perſons as ſhould pur-"chaſe the ſame, but not with intent of uſing it "himſelf." FIELD'S CASE.

On this verdict the judgment was arreſted; and the priſoner, after lying a long time in gaol, was at length diſcharged.

Lockhart's Caſe. CASE 144.

OLD-BAILEY, June Seſſion 1785. The priſoner was indicted for ſtealing a number of diamonds and pearls, the property of *Ewen Bailey*, Eſq; in the dwelling-houſe of *Narciſſa Maſcall.*

A perſon who is diſcovered (*though by means of an improper confeſſion*) to have purchaſed ſtolen property, is a competent witneſs to prove that fact.

He had made a full confeſſion of the fact, by which it was diſcovered that part of the property had been diſpoſed of to a Mr. *Grant*; and the Counſel for the proſecution called Mr. *Grant* as a witneſs, to identify the property.

The confeſſion had been obtained by ſuch promiſes of favour as rendered it inadmiſſible evidence; and it was therefore contended, that as

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the diſcovery of Mr. *Grant* reſulted from the illegal confeſſion which had been obtained from the priſoner, he, Mr. *Grant*, was not a competent witneſs.

See the caſe of Jane Warickſhall, ante, 248.

But the Court ſaid, that the law was clearly ſettled, that although a confeſſion improperly obtained cannot be given in evidence, yet it can never go to the rejection of the evidence of other witneſſes, which are got at in conſequence of ſuch a confeſſion.

CASE 145.

Aickles' Caſe.

OLD-BAILEY, SEPTEMBER SESSION 1785.

Quære, If a perſon who is convicted of a *ſingle felony*, and receives judgment of tranſportation to *America*, but is pardoned on condition of tranſporting himſelf, and giving ſecurity ſo to do, can be convicted on *the capital felony*, or ought to be *remitted to his former ſentence*, on his breaking the *ſubſequent conditions*, on which the pardon was granted.

JOHN HENRY AICKLES had been convicted in January Seſſion 1784, of ſimple grand larceny; and in the July Seſſion following, received judgment of tranſportation *to America* for ſeven years: but, in conſequence of ſtrong interceſſion in his favour, he afterwards received his Majeſty's pardon, "on condition of tranſ-"porting himſelf *beyond the ſeas* for the ſame "term of years, within fourteen days from the "day of his *diſcharge*, and of giving ſecurity to "the ſatisfaction of the Recorder ſo to do." He gave the ſecurity required, and a warrant was accordingly iſſued by the Recorder, directed to the Keeper of Newgate, authoriſing his diſcharge; but as there were a number of civil detainers againſt him, his diſcharge was neceſſarily delayed

until

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until they were ſuperſeded. On the 26th May following, he was apprehended at Iſlington; and was now put to the bar on AN INDICTMENT (*a*) for "returning from tranſportation, and being "found at large without *any lawful cauſe*, before "the expiration of the term of ſeven years, for "which he was ſentenced to be tranſported."

The daily book of a public priſon, is good evidence to prove the time of a priſoner's diſcharge.

Under theſe circumſtances, it was held incumbent on the proſecutor to prove the preciſe day on which the priſoner was *diſcharged;* and for this purpoſe Mr. *Newman*, clerk of the papers of the priſon, produced a daily book, which he kept, containing entries of the names of all the debtors and criminals who are brought into the priſon, and the times when they are diſcharged: but it appeared that thoſe entries were not made from Mr. *Newman*'s own knowledge of the facts, but that he generally made them from the information of the turnkeys, and frequently from the turnkeys' indorſements on the back of the warrants, which warrants were afterwards regularly filed.

It was contended by the priſoner's Counſel, that theſe were not original entries of the facts; and therefore that the turnkey himſelf by whom *Aickles* was diſcharged, or the original minute from which the entry of his diſcharge had been made, ſhould be produced, becauſe they alone were the beſt evidence upon this ſubject, and it

(*a*) See the caſe of P. Madan, who for a ſimilar offence was not *indicted* for a new felony, but merely brought up to the bar, and remanded to his former ſentence, on this principle, that the condition of the King's pardon, being gone, he remained preciſely in the ſame ſituation that he was the moment before the pardon was granted. Ante, page 220.

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was in the profecutor's power to produce them. It was compared to the production of a tradeſman's ledger, in order to prove the delivery of goods, inſtead of producing the original memorandum or day-book from which the ledger had been poſted; and it was argued, that no credit could be given to entries made intirely from hearſay and information, and therefore they ought not to be received as evidence.

Mr. J. Gould, Mr. B. Hotham, Mr. Recorder.

The Court, however, were clearly of opinion, That the contents of this book might be given in evidence. It is a book very different in its nature from the books or memorandums of a tradeſman. It appears to have been the conſtant and long eſtabliſhed practice of the keepers of a public priſon to regiſter the diſcharge of priſoners in ſuch a book as the one produced, and in the manner which the witneſs has deſcribed. The Clerk of the papers is a public officer in the priſon; and the law repoſes ſuch a confidence in public officers, that it *preſumes* they will diſcharge their ſeveral truſts with accuracy and fidelity; and therefore whatever acts they do in diſcharge of their public duty may be given in evidence, and ſhall be taken to be *true*, under ſuch a degree of caution as the nature and circumſtances of each caſe may appear to require, except the *falſity* of them can be made to appear; for every preſumption may be repelled by contrary evidence. In the preſent caſe, Mr. *Newman* has no private intereſt whatſoever in this book, to induce him to make factitious entries in it. He is a public officer recording a public tranſaction. Any perſon may undoubtedly falſify the entries if they can; but unleſs the truth of the entry as to the preſent

ſent fact can be impeached, it is admiſſible evidence (*a*). AICKLES' CASE.

The entry was accordingly read; and it proved that the priſoner was diſcharged from Newgate, by virtue of Mr. Recorder's warrant for that purpoſe, on the 14th of March 1785.

The fact of the priſoner's having been found at large before the term of his tranſportation had expired being clearly proved, the queſtion was, Whether he was at large *without lawful cauſe?* And it was ſubmitted to the Court upon the authority of *the King v. Max. Miller (b)*, and *Patrick Madan's Caſe (c)*, that having *literally* complied with the condition of the King's pardon, by giving ſecurity to the ſatisfaction of the Recorder to tranſport himſelf beyond the ſeas, and having in conſequence thereof been legally diſcharged from Newgate by virtue of the Recorder's warrant, that diſcharge was *a lawful cauſe* for his being at large, notwithſtanding he had forfeited the recognizance of himſelf and his bail, by breaking the other part of the condition, in not tranſporting himſelf within *the fourteen days*."

(*b*) Ante, page 73.
(*c*) Ante, page 220.

The Court appeared to differ in their opinion upon this point (*d*); and it was thought a proper queſtion for the conſideration of the Judges, in caſe the Jury ſhould find the priſoner guilty.

(*d*) See 1 Hawk. P. C. 247. note 5. and the caſe of G. Thorpe, O. B. Sept. Seſſ. 1785.

(*a*) With reſpect to evidence, there is no difference between civil actions and criminal proſecutions. 2 Term Rep. 201.—Corporation books proved to have been regularly kept, tho' not kept by the proper officer, are evidence. 1 Strange, 93.—So are Heralds books, and minutes of a viſitation. Strange, 192.—So are the rolls of a Court Baron. Dougl. 572.—So whenever the original is of a *public nature*, a copy of it is good evidence. Cowp. 17.—As of the regiſter of chriſtenings, marriages, burials, &c. though it appears that the regiſter was made from a day-book. 2 Strange, 1073.—See Onſlow's Niſi Prius, 236.

On

AICKLES' CASE.

On further evidence, however, it appeared that he had at the time of his diſcharge a real determination to quit the kingdom within the time, but that he had been prevented from carrying it into effect by unaffected poverty, diſtreſs, and ill-health; and the Court being of opinion, That theſe impediments, if true, amounted to a *lawful excuſe*, the Jury found a verdict, Not Guilty (*a*)

(*a*) By 6 Geo. 1. c. 23. if any felon ordered to be tranſported to *America*, ſhall be afterwards at large within Great Britain without ſome lawful excuſe, before his term is expired, he is guilty of a *capital offence*. By 16 Geo. 2. c. 15. perſons convicted of *ſingle felonies* and ordered to be tranſported to America, who ſhall have agreed on certain conditions to tranſport themſelves to America, are alſo guilty of a *capital offence*, if they are afterwards illegally at large. By 8 Geo. 3. c. 15. perſons convicted of *capital offences*, who are afterwards pardoned on condition, and are thereupon ordered to be tranſported to America, are likewiſe guilty of a *capital offence* if they are found at large. But when it became impracticable to ſend tranſports any longer to America, it is enacted by 19 Geo. 3. c. 74. that perſons convicted of *ſingle felonies*, who were liable to be tranſported to America, and perſons convicted of *capital offences* who had accepted a pardon on condition of tranſportation, may be ſentenced to be tranſported to *any parts beyond the ſeas*; and in every *ſuch caſe*, all the ſtatutes relating to tranſportation to America ſhould be in full force and effect, as to the puniſhment for being at large before the expiration of the terms for which they were ordered to be tranſported, or had agreed to tranſport themſelves to America, were expired; omitting the caſe of the perſon who had been convicted of ſingle felony, and who e ſentence of tranſportation to America had been pardoned, on a condition to tranſport himſelf generally *beyond the ſeas*.

Ballie's

Ballie's Caſe.

CASE 146.

A perſon committed as a *rogue and vagabond* under the 23 Geo. 3. c. 88. who breaks gaol, and on being committed as an *incorrigible rogue* under 17 Geo. 2. c. 5. breaks gaol a ſecond time, and then commits a new act of vagrancy as a *rogue and vagabond*, may be indicted for *felony*, and tranſported under the Vagrant Act.

OLD-BAILEY, September Seſſion 1785. This was a caſe reſerved by Mr. Serjeant *Adair*, Recorder, for the opinion of the twelve Judges.

The priſoner had been apprehended on the ſtatute 23 Geo. 3. c. 88. by which it is enacted, "That if any perſon ſhall be found in or "upon any dwelling-houſe, ware-houſe, coach-"houſe, ſtable, or out-houſe; or in any incloſ-"ed yard, or garden, or area, belonging to "any houſe, with intent to ſteal any goods or "chattels, he ſhall be deemed a rogue and a va-"gabond, within the meaning of the ſtatute of "17 Geo. 2. c. 5. uſually called *the Vagarant* "*Act;*" and having been committed to the Houſe of Correction till the then next enſuing Seſſion, the Juſtices, on examination of the circumſtances, had adjudged him to be a rogue and a vagabond within the meaning of the Act; and ordered him to be detained in the Houſe of Correction for ſix months, by virtue of 17 Geo. 2. c. 5. ſ. 9. Before the ſix months had expired, the priſoner made his eſcape; but he was again apprehended, and at an adjournment day of the ſame Seſſion, he was committed by a warrant of two Juſtices, under the 4th ſection of the Vagrant Act, as an incorrigible rogue, and ordered to be detained in the ſame Houſe of Correction for two years. Before this term of impriſonment had expired, he again broke out of gaol, and was again apprehended, on another clauſe of

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of the ſtatute 23 Geo. 3. c. 88. by which it is enacted, "That any perſon having upon him any "picklock key, crow, jack, bit, or other im- "plement, with an intent feloniouſly to break "and enter into any dwelling-houſe, ware-houſe, "coach-houſe, ſtable, or out-houſe; or ſhall "have upon him any piſtol, hanger, cutlaſs, "bludgeon, or other offenſive weapon, with "intent feloniouſly to aſſault any perſon, ſhall "be deemed a rogue and vagabond as afore- "ſaid."

Under theſe circumſtances, the priſoner was now indicted on the ſtatute 17 Geo. 2. c. 5. ſ. 9. by which it is enacted, that if any perſon committed as an incorrigible rogue ſhall break out or make his eſcape, or ſhall offend again *in like manner*, he ſhall be guilty of Felony, and be tranſported for ſeven years.

The indictment accordingly *ſtated*, that the priſoner had been committed by a Juſtice, and convicted by the Seſſions, as a rogue and vagabond under the 23 Geo. 3. c. 88. and having been committed for ſix months had eſcaped, &c. and committed as an incorrigible rogue, and again broke gaol before the expiration of the time, &c. And then it charged that the ſaid *George Ballie*, on ſuch a day, did offend again *in like manner* as a rogue and vagabond, in having upon him a certain offenſive weapon called a piſtol, with intent feloniouſly to aſſault ſome perſon or perſons, againſt the peace, &c.

The records of his former convictions were produced, his identity, and the fact of his having the piſtol for felonious purpoſes, was fully proved,

ed, and he was found guilty; but the judgment was reſpited, and the caſe referred to the conſideration of the Judges on the two following queſtions. BALLIE'S CASE.

Firſt, Whether the offence for which the priſoner was convicted, being created by the ſtatute 23 Geo. 3. c. 88. could be maintained under an indictment on the ſtatute of 17 Geo. 2. c. 5.?

Secondly, Whether the words "ſhall offend "again *in like manner*," in the ſtatute of 17 Geo. 2. c. 5. do not refer to ſuch offences only as bring the offender under the deſcription of an incorrigible rogue: and if ſo, Whether the preſent indictment is good in charging the priſoner with having offended *in like manner* as a rogue and vagabond, inſtead of having offended *in like manner* as an incorrigible rogue?

Mr. Juſtice *Gould* in February Seſſion 1786, after ſtating the proceedings above-mentioned, delivered the opinion of the Judges to the following effect:

This caſe was reſerved by Mr. Recorder, upon two objections raiſed by the Counſel for the priſoner. On the firſt day of laſt Hilary Term, the Judges aſſembled to conſider of this caſe; and they are unanimouſly of opinion, That there is no foundation in law for either of the objections.

As to the firſt objection,—The title of an Act of Parliament, although it is not conſidered as any part of the Act, yet it may ſerve to explain the

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the intent and meaning of the Legiſlature; and the title of the 23 Geo. 3. c. 88. is "An act "to extend the proviſions of an act [ſetting out "the title of the 17 Geo. 2. c. 5.] to caſes not "therein mentioned." It enacts, that every perſon under the circumſtances in which the priſoner is deſcribed in the indictment to have been found, ſhall be deemed a rogue and vagabond within the meaning of the 17 Geo. 2. c. 5. The Judges are therefore of opinion, That the 23. Geo. 3. c. 88. is to have the ſame operation as if the offences deſcribed in it had been originally inſerted in the Vagrant Act, in continuation of the offences therein deſcribed; and that it is in every reſpect to be conſidered as incorporated into, and making a part of, that Act.

As to the ſecond objection,—The Judges upon weighing the ſeveral proviſions of the 17 Geo. 2. c. 5. as far as they apply to the caſe of the priſoner, are of opinion, That the indictment is right both in form and ſubſtance. The ſtatute divides offences into three claſſes. *Firſt*, Idle and diſorderly perſons, who on conviction by one witneſs, before one Juſtice, may be committed to the Houſe of Correction, not exceeding one month. *Secondly*, Rogues and vagabonds, who are to be examined by the Magiſtrate, and publicly whipped, or ordered to be ſent to the Houſe of Correction (*a*) till the next Seſſion, or for any leſs time, as ſuch Juſtice ſhall think proper. *Thirdly*, Incorrigible rogues, who it ſeems muſt be committed till the next Seſſion, and cannot be puniſhed by the Magiſtrate.

(*a*) Or by 17 Geo. 3. c. 11. to the common gaol.

It appears that the priſoner eſcaped from his commitment as a rogue and vagabond, upon which eſcape he immediately became an incorrigible

gible rogue; and on being brought before the Seſſion, he was ſo adjudged, and ſentenced to be detained in the Houſe of Correction for two years, and afterwards made his eſcape. Theſe facts are introduced into the indictment; and it then goes on to ſtate the offence which he had committed againſt the ſtatute 23 Geo. 3. c. 88. and concludes by averring in the words of the 17 Geo. 2. c. 5. that he had "offended again "*in like manner.*"

The ſtatute of 23 Geo. 3. c. 88. declares, that the perſons therein deſcribed ſhall be conſidered as rogues and vagabonds within the meaning of the 17 Geo. 2. c. 5. It is enacted by the 17 Geo. 2. c. 5. ſ. 4. "That all *rogues and vaga-* "*bonds* who ſhall break or eſcape out of any "Houſe of Correction before the expiration of "the term for which they were committed; "and all perſons who, after having been puniſh- "ed as *rogues and vagabonds*, and diſcharged, "ſhall again commit *any of the ſaid offences;* "ſhall be deemed *incorrigible rogues.*" The Act then goes on in ſect 9. to authoriſe the Juſtices in Seſſion to detain ſuch *rogue and vagabond* in the Houſe of Correction for any time not exceeding ſix months; and ſuch *incorrigible rogue* for any time not leſs than ſix months, nor exceeding two years; and then follows the clauſe on which the preſent queſtion ariſes: "And if "ſuch *incorrigible rogue*, ſo ordered by the Seſſions "to be detained in the Houſe of Correction, "ſhall break out or make his eſcape, *or* ſhall "offend again in like manner, he ſhall be guilty "of felony, and be tranſported for ſeven years." The context of this clauſe of the Act which adopts the words "*in like manner*," refers to the next

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next antecedent words, "*ſhall break out or make* "*his eſcape;*" recourſe therefore muſt be had to the other parts of the Act, to find out what the Legiſlature by theſe words mean: and the Judges are of opinion, That the words "*in like man-* "*ner*" muſt neceſſarily refer to the offences deſcribed in the fourth ſection before-mentioned.

What then is the ſituation of the priſoner? He is committed to the Houſe of Correction for ſix months as a *rogue and vagabond:* by breaking gaol he is guilty of a new act of vagrancy, and is adjudged and committed for two years as an *incorrigible rogue:* from this impriſonment he again makes his eſcape before the two years are expired; and commits another act of vagrancy as a *rogue and vagabond*, againſt the 23 Geo. 3. c. 88. By this eſcape he becomes *an incorrigible rogue* a ſecond time; and he afterwards offends again "*in like manner*" as a rogue and vagabond. All theſe facts are diſcloſed in the indictment. No technical terms or words of art are made neceſſary to the deſcription of this offence. The law therefore muſt draw the inference from the words, *viz.* that by having offended again in like manner as a *rogue and vagabond*, he becomes *an incorrigible rogue* a ſecond time, and thereby incurs the guilt of felony; and it is therefore the unanimous opinion of the Judges, That the indictment is proper, and that the priſoner is in the predicament which the Legiſlature has ſaid ſhall be puniſhed with tranſportation.

He was accordingly ordered to be tranſported for the term of ſeven years.

James

James Scott's Caſe.

CASE 147.

OLD-BAILEY, October Seſſion 1785, *James Scott* and two others were convicted on the ſtatute 11 Geo. 3. c. 40. for counterfeiting the copper monies of this realm called a farthing; and having been before convicted of the ſame offence, and allowed the benefit of clergy, the Counſel for the proſecution prayed that Judgment of death might be paſſed upon them, purſuant to the ſtatute 4 Hen. 7. c. 13.

Quære, If the variance of *Sir George Nares*, inſtead of *Sir George Nares, Knt.* between the counter-plea, is fatal.

For this purpoſe A COUNTER-PLEA was filed of record againſt *James Scott*, reciting the record of his former conviction, and averring the identity of his perſon, and that he had before been allowed the benefit of his clergy.

To this plea the priſoner, by the advice of a gentleman at the bar, replied *nul tiel record*, and denied that he was the perſon named in the plea. Iſſue was joined on this replication, and a Jury returned *inſtanter*, and ſworn *(a)* "well and "truly to try, Whether the priſoner at the bar, "*James Scott*, was convicted of felony at the "Old Bailey, on Wedneſday 16th October "1782? and, Whether he is the ſame perſon "that was tried and convicted, and received the "benefit of his clergy?"

(a) The Court informed the priſoner, that he had a right to challenge any of the Jurors before they were ſworn. *Sed vid.* 1 Blac. Rep. 4. Foſter, 42, 46. 2 Hawk. 561.

On comparing the record of conviction with the recital of it in the counter-plea, a variance was diſcovered; the record alledging that the priſoner was tried before *Sir George Nares, Knight*; and

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and the counter-plea only ſtating that he was tried before *Sir George Nares*, omitting the addition *Knight*.

Vide Lockup's Caſe, cited 1 Term Rep 240.

It alſo omitted to give juriſdiction to the Court before which the indictment was tried.

The Jury on hearing the evidence found a verdict for the Crown; but the ſentence was reſpited, and the caſe referred to the conſideration of the twelve Judges.

The priſoner ſtill continues in Newgate; and no opinion has yet been given upon this caſe.

Case 14.

The Caſe of John Hughes and others.

There muſt be both a breaking and an entering to conſtitute burglary; and the *breaking* muſt be ſuch as will afford the burglar an opportunity of *entering* ſo as to commit the intended felony.

THIS was an indictment for Burglary with intent to ſteal, tried before Mr. Juſtice *Willes* at the Old Bailey, in December Seſſion 1785.

It appeared in evidence, that the priſoner had bored a hole, with an inſtrument called a *center-bit*, through the pannel of the houſe-door, near to one of the bolts by which it was faſtened, and that ſome pieces of the broken pannel were found within-ſide the threſhold of the door; but it did not appear that any inſtrument, except the point of the center-bit, or that any part of the priſoners bodies had been within-ſide the houſe, or that the aperture made was in fact large enough to admit a man's hand.

The

HUGHES' CASE.

The Court was clearly of opinion, That this was a ſufficient *breaking;* but the doubt was, Whether it could poſſibly be conſtrued ſuch an *entry* as the law requires to conſtitute the crime of burglary? The point was argued by Counſel to this effect:

For the priſoner.—Whatever notions may have prevailed upon this ſubject in times of high antiquity, it has been long eſtabliſhed in theory, and confirmed by the uniform practice of ages, that there muſt be both a *breaking* and an *entering* to conſtitute the crime of burglary. They are diſtinct and ſeparate acts; and "the words *fregit* "*et intravit*," ſays Lord *Hale*, "are indiſpenſa-"bly neceſſary to an indictment for this offence; "for breaking without entering, or entering "without breaking, makes not burglary *(a)*." But the queſtion in the preſent caſe is, Whether theſe acts can be ſaid to be compleat, unleſs they are carried into ſuch a degree of effect as will afford to the burglar an opportunity of committing the premeditated felony? In burglary, there muſt be a *breaking in fact;* for a mere breaking in conſtruction of law is not ſufficient *(b)*; and until the paſſing of the 12 Ann. c. 7. an *actual entry* into the houſe, ſubſequent to and by means of the breaking, was alſo required. There are, however, ſome caſes upon this ſubject, in which it muſt be acknowledged, that from an anxiety to preſerve domeſtic ſecurity ſacred and inviolate during the hours of night, the ancient principles of the common law reſpecting burglary, have been conſtrued with a latitude not uſual in queſtions of life or death; and it has been held, that the ſmalleſt degree of *entry* whatever is ſufficient to ſatisfy the law. Putting a hand or a foot, or a piſtol,

(a) 1 Hale, 550. 1 Hawk. P. C. 160.

(b) 1 Hale, 552. Dalt. 487. Kely. 67, 70.

HUGHES' CASE.

a piſtol, over the threſhold of the door, or a hook or other inſtrument through the broken pane of a window, have been decided to be burglarious entries; but the principle of all theſe new determinations is, that there has been ſuch a previous breaking of the caſtle of the proprietor, as to render his property inſecure, by affording to the burglar an opportunity to commit the projected felony, of whatſoever kind or deſcription that felony may be. By the introduction of ſuch effective members of the body as the hand or the foot, it is clear that there muſt be an opportunity afforded of taking out property, and therefore ſuch entries are held ſufficient. By the introduction of a piſtol, terror is applied to the true man, and the property is taken by means of fear. And in thoſe caſes where an inſtrument has formed any part of the queſtion, it has always been taken to mean, not the inſtrument by which the breaking was made, but the inſtrument, as a hook, a fork, or other thing by which the property was capable of being removed, introduced ſubſequent to the act of *breaking*, and after that eſſential preliminary had been fully compleated. Suppoſe the brick wall of a houſe to be broken with a pickaxe, and that part of the pickaxe had in the violence of breaking been within-ſide of the houſe, could this have been held an *entry* to ſteal?

1 Hale, 439, 555. Sum. 80. Kely, 111. Foſter, 359, 355. 1 Hawk. 161.

In the preſent caſe, the introduction of the inſtrument is part of the act of breaking; but it is impoſſible to conceive that it was introduced for the purpoſe of purloining property, for it is incapable of performing ſuch an office. It was uſed for the purpoſe of breaking into the *domicile* of the proprietor; and if the breaking it effected had enabled the priſoners by any poſſible means to

to have taken goods through the aperture, that branch of the offence would moſt certainly have been compleat; but as no property has been proved to lie near the hole, ſo as to be removed by means of a hand, hook, or other inſtrument, the degree of breaking itſelf ſeems inſufficient. The caſes that have been mentioned of entries by a hand, or a foot, or a piſtol, all proceed on the idea that the breaking had been previouſly compleated, and are conſidered as acts of dominion acquired by the breaking over the property of the owner; but there is not a caſe which has yet gone the length of determining, that the introduction of an inſtrument in the act of breaking ſhall ſatisfy the two acts which the law requires, *viz.* a *breaking* to obtain dominion over the property, and an *entry* to ſteal it. HUGHES' CASE.

The priſoners were acquitted.

CASE 149. The King *againſt* Braſier.

No teſtimony can be received except upon oath; and an infant under ſeven years may be ſworn, if ſhe appears to underſtand the nature of an oath. Ante, page 114.

THIS was a caſe reſerved for the opinion of the twelve Judges, by Mr. Juſtice *Gould*, at the Summer Aſſizes for York, in the year , on the trial of an indictment for a rape on the body of an infant under ſeven years of age. The information of the infant was received in evidence againſt the priſoner; but as ſhe had not attained the years of preſumed diſcretion, and did not appear to poſſeſs ſufficient underſtanding to be aware of the dangers of perjury, ſhe was not ſworn.

1 Hale, 302, 634. 2 Hale, 279. 11 Mod. 228. 1 Strange, 700. 1 Atkins, 29. Foſter, 70. 2 Hawk. 612. Gilb, L. E. 144.

The priſoner was convicted; but the judgment was reſpited, on a doubt, Whether evidence, under any circumſtances whatever, could be legally admitted in a criminal proſecution except upon *oath?*

The Judges were unanimouſly of opinion, That no teſtimony whatever can be legally received except upon oath; and that an infant, though under the age of ſeven years, may be ſworn in a criminal proſecution, provided ſuch infant appears, on ſtrict examination by the Court, to poſſeſs a ſufficient knowledge of the nature and conſequences of an oath; for there is no preciſe or fixed rule as to the time within which infants are excluded from giving evidence; but their admiſſibility depends upon the ſenſe and reaſon they entertain of the danger and impiety of falſehood, which is to be collected from their anſwers to queſtions propounded to them by the Court; but if they are found incompetent, their teſtimony cannot be received.

John

John Ruſton's Caſe.

CASE 150.

AT the Old Bailey, January Seſſion 1786, on the trial of *William Bartlet* for ſimple grand larceny, *John Ruſton*, a man *mutus et ſurdus à nativitate*, was produced as a witneſs on the part of the Crown.

A witneſs, tho' *deaf* and *dumb*, may be ſworn and give his teſtimony for felony, if intelligence can be conveyed to, and received from him by means of ſigns and tokens.

Martha Ruſton his ſiſter, being examined on the *voir dire*, it appeared that ſhe and her brother had been for a ſeries of years enabled to underſtand each other by means of certain arbitrary ſigns and motions, which time and neceſſity had invented between them. She acknowledged that theſe ſigns and motions were not ſignificant of letters, ſyllables, words, or ſentences, but were expreſſive of general propoſitions, and intire conceptions of the mind; and that the ſubjects of their converſation had in general been confined to the domeſtic concerns and familiar occurrences of life. She believed however that her brother had a perfect knowledge of the tenets of chriſtianity, and was certain that ſhe could communicate to him true notions of the moral and religious nature of an oath, and of the temporal dangers of perjury.

See the caſe of Eliz. Steele.

It was objected by the priſoner's Counſel, that although theſe modes of conveying intelligence might be capable of impreſſing the mind with ſome ſimple ideas of the exiſtence of a God, and of a future ſtate of rewards and puniſhments; yet they were utterly incapable of communicating any perfect notions of the vaſt and complicated ſyſtem of the chriſtian religion; and therefore the witneſs

RUSTON'S CASE.

could not with propriety be ſworn upon the Holy Goſpels. The difficulty of arraigning a man for perjury whom the law preſumes to be an ideot, and who is conſequently incapable of being inſtructed in the nature of the proceedings againſt him, was alſo urged againſt the admiſſibility of the witneſs.

Mr. J. Heath.

But the Court over-ruled the objection; and *John Ruſton* was ſworn to depoſe "the truth," &c. and *Martha Ruſton* "well and truly to interpret to *John Ruſton*, a witneſs here produced in behalf of the King againſt *William Bartlet*, now a priſoner at the bar, the queſtions and demands made by the Court to the ſaid *John Ruſton*, and his anſwers made to them."

The priſoner was found guilty, and received ſentence of tranſportation for ſeven years.

CASE 151.

Mildrone's Caſe.

A Scotch covenanter may give evidence in a criminal proſecution, on being ſworn according to the cuſtom of his *ſect*, without kiſſing the book.

AT the Old Bailey, in February Seſſion 1786, *David Mildrone* was produced as a witneſs on the trial of *Chriſtiana Fitzpatrick* for larceny. He ſtated to the Court that he was a North-Briton, and that the way of ſwearing in Scotland was not to kiſs the book.

Mr. Juſtice *Gould* ſaid, that on the trial of the Rebels at Carliſle in the year 1745, finding it to be the ceremony of a particular ſect, he admitted

ted a witneſs to ſwear by the form of holding up his hand, without touching the book or kiſſing it; and that he afterwards referred the caſe to the opinion of the twelve Judges, who determined that the witneſs was legally admitted.

MILDRONE'S CASE.

2 Sid. 6. 2 Keb. 314. Stra. 1104. 2 Eq. Ca. Ab. 397. 1 Atk. 21. Comp 390.

Upon the authority of this caſe *David Mildrone* was ſworn by *Thomas Shelton, Eſq.* Clerk of the Arraigns, in the following form:

"You ſwear according to the cuſtom of your "country, and the religion you profeſs, that "the evidence you ſhall give between our So-"vereign Lord the King and the priſoner at the "bar, ſhall be the truth, the whole truth, and "nothing but the truth, ſo help you God."

The priſoner was convicted.

William Wynne's Caſe.

CASE 152.

AT the Old Bailey, in April Seſſion 1786, *William Wynne* was indicted before Mr. Baron *Eyre*, for ſtealing a deal-box, containing a quantity of wearing-apparel and two bonds, the property of *Francis Welden*, Eſq.

If a parcel be accidentally left in a hackney-coach, and the coachman inſtead of reſtoring it to the owner detains it, opens it, deſtroys part of its contents, and borrows money on the reſt, he is guilty of felony.

The priſoner was a Hackney-Coachman, and was called from his ſtand to convey the proſecutor from Oſborn's Hotel in the Adelphi to N° 9,

Orchard-

WYNNE'S CASE.

Orchard-ſtreet, Portman-ſquare. Among ſeveral trunks and packages which were put into the coach was the box mentioned in the indictment. On arriving at the houſe in Orchard-ſtreet, the proſecutor took all the articles out of the coach except this box, which remained under one of the ſeats. The priſoner received his fare, and drove away. A few minutes after he was gone the box was miſſed, and every poſſible means were uſed that day to diſcover the coach; but without ſucceſs. Hand bills were diſperſed the enſuing morning, and advertiſements inſerted in the public prints, offering a reward to any perſon who ſhould bring home the box. Two days afterwards two perſons called at the proſecutor's houſe in Orchard-ſtreet, and deſired to ſpeak with the Gentleman who had loſt the box; but he not happening to be at home, they left the number of the coach in which it had been left, and the nick-name of the coachman. The very next morning, as the proſecutor was going along Holborn, he diſcovered both the coach and coachman waiting at a door for his fare. The priſoner, on perceiving him, immediately ſaid, "Sir, I and my wife were at your houſe this "very day with the box, but I did not leave it, "becauſe no perſon was at home to pay the "Three Guineas you offered for finding it; and "wanting money very much, I have carried it "to one *Michael Mitchel*, a Jew, who lives at "N 5, New Caſtle-ſtreet, Whitechapel." The proſecutor and the priſoner went together immediately to the Jew's houſe. The Jew produced the box, but on examination it was found uncorded, with the haſps forced off; and two bonds, with the papers out of ſeveral pocket-books, were miſſing. The priſoner acknowledged

ed that he had uncorded the box, and looked at ſome of the things, but denied having taken any of them away. He alſo acknowledged having borrowed eight ſhillings of the Jew's wife when he left the box that morning in her cuſtody. The priſoner accuſed the Jew of having burned the bonds. The Jew retorted the ſame charge upon the priſoner.

The learned Judge obſerved, that as it appeared the priſoner had not originally taken poſſeſſion of the property himſelf, but that it had been thrown upon him by the negligence of the proſecutor, in leaving it behind him in the coach, no felonious intention could be ſuppoſed to exiſt in his mind at the moment the property was firſt acquired; and although the ſubſequent circumſtance of his keeping it till it was advertiſed was a breach of moral duty, it could not of itſelf be legally conſidered as a criminal converſion. He therefore directed the Jury, that if they thought the priſoner had detained the box merely in the hope and expectation that a reward would be offered for its reſtoration, and that he meant then to return it to its right owner, they ought to acquit him; but that, on the other hand, if they were in their conſciences perfectly ſatisfied that he had uncorded the box, not merely from natural though idle curioſity, but with an intention to embezzle any part of its contents, it would become a matter of legal conſideration, whether a perſon ſo guilty ſhould not be reached as a felon?

The Jury found the priſoner *Guilty;* but the judgment was reſpited, and the caſe ſubmitted to the opinion of the twelve Judges.

In

WYNNE'S CASE.

In the July Seſſion following the priſoner was put to the bar, and informed by the Recorder, that his caſe had been conſidered by the Judges, and that they approved of the verdict the Jury had given.

He received ſentence of tranſportation for ſeven years (*a*).

(*a*) At the Old Bailey, in January Seſſion 1789, *John Sears* was indicted before Mr. Juſtice *Aſhhurſt*, for ſtealing a parcel of callico, and other things, the property of *Sarah Dixon*. The proſecutrix hired the priſoner, who was a Hackney-Coachman, to drive her from her houſe in Mancheſter Buildings to a Linen-Draper's in Oxford-Road, where ſhe purchaſed the articles named in the indictment. They were tied up in a parcel, and put into the coach. The priſoner drove back to Mancheſter Buildings, and the proſecutrix, on getting out of the coach, ordered him to give the parcel to her ſervant; but he neglected ſo to do, and drove *expeditiouſly* away. The things were advertiſed, and a reward offered to any perſon who ſhould reſtore them; but without effect. A few days afterwards the proſecutrix met the priſoner; but he denied all knowledge of her perſon, or of the things, or of his ever having had ſuch a fare. The goods, however, were traced to the priſoner's poſſeſſion, and the parcel had been opened. The priſoner on his defence acknowledged that he had driven the proſecutrix from Mancheſter Buildings to the Linen-Draper's and back again, but he denied that ſhe ever deſired him to deliver the parcel to her ſervant. Upon this evidence he was convicted of felony, and received ſentence of impriſonment for ſix months, by virtue of the ſtatutes of 5 Anne, c. 6. and 19 Geo. 3. c. 74. ſ. 3.

Charles

Charles Lee's Caſe.

CASE 153.

A variance on the 13 Geo 3 c. 56. between a *Lion rampant* and a *Lion paſſant* held fatal.

OLD-BAILEY, May Seſſion 1786. This was an indictment on the ſtatute 13 Geo. 3. c. 56. for removing from one ſilver knee-buckle to another ſilver knee-buckle certain ſtamps, marks, and impreſſions; *to wit*, the King's Head and the *Lion rampant;* with intent to defraud the King, againſt the ſtatute, &c.

On producing the ſilver knee-buckle in evidence, it appeared that the mark was a *Lion paſſant* inſtead of a *Lion rampant*, and the Court held the variance fatal.

William Haſlam's Caſe.

CASE 154.

The principal felon is a competent witneſs on the ſtatute 22 Geo. 3. c. 58. againſt an acceſſary for receiving ſtolen goods.

OLD-BAILEY, May Seſſion 1786.—The ſtatute 22 Geo. 3. c. 58. recites, that the pernicious practice of buying and receiving ſtolen goods had become a great evil, by reaſon of the difficulty of diſcovering the perſons guilty of the ſame, and of the inſufficiency of the laws in being for the puniſhment of ſuch offenders; and therefore it enacts, "That in all caſes whatſoever "where any goods or chattels (except lead, "iron, copper, braſs, bell-metal, and ſolder) "ſhall have been feloniouſly taken or ſtolen, "every perſon who ſhall buy or receive any ſuch "goods and chattels, knowing the ſame to have "been ſo taken or ſtolen, ſhall be guilty of, and "may be proſecuted for a Miſdemeanor, al-

"though

HASLAM'S CASE.

" though the principal felon be not before convicted of the felony, and whether ſuch felon " be amenable to juſtice or not. And if the " felony amounts to grand larceny, or ſome " offence, and the principal felon ſhall not have " been convicted, ſuch offender ſhall be exempted from being puniſhed as an acceſſary, if the " principal ſhall be afterwards convicted."

William Haſlam was tried upon this ſtatute for receiving a piece of printed callico, the property of Meſſ. *Eyre* and *Acton*, he well knowing the ſame to have been ſtolen, and the perſon who had ſtolen the ſame not having been convicted.

Richard Rogers, the principal felon, was produced as witneſs. The queſtion was, Whether the principal could, in this caſe, be legally admitted as a witneſs againſt the acceſſary? and the point was debated by Mr. *Shepherd* in favour of the priſoner, and by Mr. *Silveſter* on the part of the Crown.

The Court received the evidence, and the Jury found the priſoner *Guilty*. But the judgment was reſpited, and the caſe ſubmitted to the conſideration of the twelve Judges; and they were unanimouſly of opinion, That a principal felon may be admitted as a witneſs againſt his acceſſary, under this Act of Parliament (*a*).

(*a*) Declared by Mr. Juſtice *Heath*, in the July Seſſion following, on the trial of *Hugh Price* as a principal, and *William Collins* as acceſſary.

Major

Major Semple's Caſe.

CASE 155.

AT the Old-Bailey, in July Seſſion 1786, *J. G. Semple* was put to the bar, to be arraigned on an indictment of larceny.

An indictment quaſhed becauſe the addition was placed after the *alias dictus*, and not after the *firſt name*.

The indictment ſtated, "That *James George* "*Harrold*, otherwiſe *Semple*, otherwiſe *Kennedy* "Labourer, one chaiſe, called a Poſt-Chaiſe, of "the value of Fifty Pounds, the goods and chat-"tels of *John Lycett*, feloniouſly did ſteal, take, "and carry away, &c."

2 Inſt. 669. Cro. Eliz. 583. Dyer, 88.

Before the priſoner had pleaded, it was moved to quaſh the indictment on the ground of informality; the *addition* being placed after the *alias dictus*, and not after the firſt name.

The Court, upon the authority of *Staundforde*, *Hale*, and *Hawkins' Pleas of the Crown*, directed the indictment to be quaſhed, and the priſoner to be detained till the next Seſſion.

Staund. 68. 2 Hale, 177. 2 Hawk. 328.

CASE 156.

At the enſuing Seſſion the priſoner was again indicted for the ſame offence, before Mr. Serjeant *Adair*, Recorder, preſent Mr. Juſtice *Gould*, and Mr. *Roſe*, D. R.

To hire a chaiſe for any length of time, with an intention to convert it of it to the

wrongfully to the uſe of the hirer, is larceny; and the non-delivery owner is evidence of ſuch converſion.

The

SEMPLE'S CASE. The following facts appeared in evidence:—The profecutor, Mr. *Lycett*, was a Coachmaker, who let out carriages to hire. The priſoner was a Gentleman who lodged in the neighbourhood, and had frequently hired chaiſes from the profecutor, as the occaſion required, and for which he had always paid with great punctuality. On the firſt of September 1785, the priſoner hired a poſt-chaiſe of the profecutor, ſaying that he ſhould want it for three weeks or a month, as he was going a tour round the North. It was agreed that the priſoner ſhould pay at the rate of five ſhillings a day during the time that he kept the chaiſe; and a price of Fifty Guineas was talked about in caſe he ſhould determine to purchaſe the chaiſe on his return to London, but no poſitive agreement took place between them on the ſubject of the purchaſe. In a few days afterwards the priſoner fetched the chaiſe from Mr. *Lycett*'s with his own horſes; and it was in evidence, that he was driven in it from London to the Crown and Cuſhion at Uxbridge, where he ordered a pair of horſes, and went from thence to the *Duke of Portland*'s, and returned. He took freſh horſes at the Crown and Cuſhion, but where he went with the chaiſe afterwards did not appear. The fact was, he never returned it to Mr. *Lycett*; nor could any tidings be obtained of him till twelve months afterwards, when he was accidentally apprehended by the activity of Mr. *Feltham*, in Fleet-ſtreet, upon a ſuſpicion of having, under falſe pretences, defrauded him of a quantity of ladies hats.

Mr. Garrow, Mr. Agar. The Counſel for the priſoner ſubmitted to the Court, that admitting the whole of the evidence to be true, the offence did not amount to Felony; and

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and they endeavoured to diſtinguiſh it from *the King v. Pares* (*a*), and *Aickles' Caſe* (*b*), inaſmuch as in thoſe caſes the parties had never obtained the legal poſſeſſion of the property delivered to them; but that in the preſent caſe the priſoner had obtained the chaiſe upon a contract, which it was not proved that he had broken; for the chaiſe was not hired for any definite length of time, or to go to any certain place; and the mere underſtanding that it was for three weeks or a month, for the purpoſe of making a tour round the North, made no part of the contract. He had hired it for ſuch a length of time as he ſhould pleaſe to keep it, at a certain ſtipulated price for each day; and it being delivered to him upon theſe terms, he had the entire poſſeſſion of it in himſelf, and was anſwerable in damages for its detention, or for any injury which might happen to it during his abſence. But ſuppoſing the contract ſhould be thought not to extend beyond the three weeks or a month, it is clear that during that time he had at leaſt the legal poſſeſſion; and then no intention to convert it wrongfully to his own uſe ariſing afterward, whether from neceſſity or diſhoneſty, will make the withholding it felony; for the *animus furandi* muſt exiſt at the time the property is firſt obtained. In all the leading caſes upon this ſubject of conſtructive felony, there has always been ſome evidence of a tortious *converſion*; but in this caſe it has not been proved that the priſoner has diſpoſed of the chaiſe: it may be at this very moment in his poſſeſſion, for any thing that appears to the contrary, and a converſion cannot be inferred from his having neglected to return it.

(*a*) Ante, page 243.
(*b*) Ante, page 266.

The Court.—The Court is bound by the determination of former caſes. It is now ſettled that the

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the queſtion of intention is for the conſideration of the Jury; and in the preſent caſe, if they ſhould be of opinion that the original hiring of the chaiſe was felonious, it will fall preciſely within the principle of *Pares' Caſe*, and the other deciſions which the Judges have made upon the ſubject of conſtructive felony. If there was a *bonâ fide* hiring of the chaiſe, to pay ſo much for every day for the uſe of it, and a real intention of returning it, a ſubſequent converſion of it cannot be felony, whether the time for which it was hired be limited or indefinite; for by the *bonâ fide* contract, and ſubſequent delivery, the priſoner would have acquired the lawful poſſeſſion of it; and therefore, although he afterwards abuſed that truſt and that poſſeſſion, felony could not enſue, becauſe the original taking was lawful *(a)*. But, on the other hand, if the hiring was only a pretence made uſe of to get the chaiſe out of the poſſeſſion of the owner, without any intention to reſtore it, or to pay for it; in that caſe, the law ſuppoſes the poſſeſſion ſtill to reſide with the owner, though the property itſelf is gone out of his hands, and then the ſubſequent converſion will be felony. The caſe of *the King v. Pares* was very ſolemnly debated at Ld. Ch. Juſtice *De Grey*'s houſe *(b)*; and the unanimous opinion of the Judges was at laſt, That the direction given to the Jury by the learned Judge who tried the priſoner was right. The moſt important part of the argument turned upon the conſideration, Whether the delivery of the horſe to *Pares* had in law diveſted the owner either of his property or the poſſeſſion of it? The queſtion left with the Jury was, Whether the con-

(*a*) A horſe was hired in London to go to Barnet and back again. The priſoner rode to Barnet, and returned to London; but inſtead of reſtoring the horſe to its owner, he ſold it in London; and the Court held, that the original contract by which the priſoner had acquired the legal poſſeſſion of the horſe was determined, and that therefore the ſubſequent converſion was felony. Charlewood's Caſe, O. B. February Seſſion 1786. —(*b*) Mr. Juſtice Gould ſaid he was one of the Judges who was preſent.

tract

tract was meant fairly? or, Whether it was a mere colour and pretence? The Jury found, that it was a mere colour and pretence; and upon that finding, the Judges determined the taking to be felony; becauſe it is an eſtabliſhed principle of law, that the poſſeſſion of property cannot be obtained through the medium of a fraud. But it has been attempted to diſtinguiſh the preſent caſe from *the King v. Pares*.—*Firſt*, That the hiring in this caſe was indefinite, but that in *the King v. Pares* it was certain, and limited. The time cannot be material in queſtions of this nature. *Pares* hired the horſe in the morning, under pretence of going to *Sutton* in *Surrey*, and to return in the evening; but as the hiring was found to be felonious, the law of the caſe muſt have been the ſame, although it had appeared that the hiring was for two days, a week, a month, or any other given time; nay, if the time had been left intirely unlimited. The circumſtance of the time being long or unſettled may indeed render the proof of guilt more difficult, but cannot alter the law of the caſe.—*Secondly*, It is ſaid, that this caſe differs from *the King v. Pares*, becauſe it was proved that *Pares* had ſold the horſe, and therefore had converted it to his own uſe; but that in the preſent caſe no proof has been given that the priſoner has ſold or otherwiſe converted the chaiſe. Proof of actual converſion certainly is not neceſſary, but the Jury muſt judge of it from the circumſtances of the caſe. If the priſoner, at any time before the proſecution was commenced, had offered to reſtore the chaiſe to the owner, or to pay him for it, ſuch a conduct would have been evidence of an honeſt intention when he originally hired it, and would have reprobated the idea of a fraudulent deſign. But he hires the chaiſe for a month,

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and

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and a year paſſes, and neither the chaiſe nor the man are heard of till he is taken. There is no evidence even at this moment that the chaiſe is forthcoming, nor does any one pretend to know where it is. This therefore raiſes a preſumption againſt the priſoner, which it is incumbent on him to repel; and if he cannot, it will be for the conſideration of the Jury, under all the circumſtances of the caſe, whether they think he has *feloniouſly* diſpoſed of it, or otherwiſe converted it to his own uſe. In their determination of this point they muſt recur to the time of the original hiring, and to the nature and meaning of the contract then made between the parties. If they think the *re-delivery* of the chaiſe formed any part of the contract, the *non-delivery* of it muſt neceſſarily form a part of their conſideration. They will then conſider whether the *non-delivery* is ſufficient evidence to ſatisfy their conſciences that he has converted it to his own uſe. Theſe two conſiderations will naturally lead to a third, *viz.* Whether the property thus converted was originally obtained with a felonious deſign? which will carry them back to the inſtant of time that he obtained poſſeſſion of it: and if they ſhould find the original hiring was felonious, the moſt ingenious ſubtlety cannot diſtinguiſh this caſe from that of *the King v. Pares*. There is a caſe in *Kelynge* of a perſon who took a lodging in a houſe, and afterwards at night, while the people were at prayers, robbed them. The jury found that the intention of taking the lodging was to commit the felony; and the Judges determined that this was *burglary*. There was alſo a caſe determined very lately by the Judges. A man ordered a pair of candleſticks from a ſilverſmith to be ſent to his lodgings. They were ſent to his lodgings, with a bill

a bill of parcels; but he contrived to ſend the ſervant back, and to keep the goods; and this was held to be felony, although they were delivered, with the bill of parcels, under an expectation of being paid the money: for the Jury found it a pretence to purchaſe, with intention to ſteal. SEMPLE'S CASE.

The queſtion of original intention was left with the Jury; and they found the priſoner *Guilty*. A motion was made in arreſt of judgment; but he received ſentence of tranſportation for ſeven years.

The King *againſt* Fearnley.

CASE 157.

IN THE KING'S BENCH, TRINITY TERM 1786.

THIS was an indictment on the ſtatute 18 Eliz. c. 3. and 9 Geo. 1. c. 7. found at the Quarter Seſſion at *Knareſborough*, in the county of *York*, againſt *John Fearnley*, as one of the Overſeers of and for the townſhip of *Checkeaton*, in the ſaid county, for neglecting and refuſing to obey an order of two Juſtices for the maintenance of a pauper, the mother of a baſtard child; the ſaid order, on ſuch a day, having been duly ſhewn, and delivered to the ſaid *John Fearnley*.

The caption of an indictment muſt ſhew that the Court when it was found had *juriſdiction*; and on demurrer the ſuperior Court will look into the *whole record*.

The indictment was removed by *Certiorari* into the Court of King's Bench. The caption ſtated, That a Quarter Seſſion was "holden *on Tueſday the 4th day of October*, "in the 25th year of the "reign, *&c.*" That the ſame Seſſion *is adjourned* until *Thurſday the 6th day of* July *aforeſaid*,

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in the year aforeſaid. And then it goes on; "and "on the ſaid *Thurſday*, *the 6th day of* October "aforeſaid, in the year aforeſaid, is holden by "adjournment, *&c.* And on the ſaid *Thurſday*, "*the 6th day of October* aforeſaid, *&c.* it was pre-"ſented as followeth, *&c.*

To this indictment the defendant demurred.

S. P. C. 96. Cro. Eliz. 103. 4 Co. 41. Plowd. 76 Ld. Raym. 712.

Mr. *Fearnley*, in ſupport of the demurrer, contended, *Firſt*, That as the caption ſtated the Seſſion which was held on the *4th October* 1785, to have been adjourned to *Thurſday the 6th July*, *in the year aforeſaid*, and as the indictment was found at a Seſſion holden by adjournment on the *ſixth of October*, it appeared that the Court was held without any adjournment, and therefore had not competent juriſdiction; for that every caption of an indictment muſt ſhew that it was taken before a Court having competent juriſdiction. 2 *Hawk. P. C. 6th Edit.* 359.

Where an allowance is made to a pauper weekly, it is due at the beginning of the week.

Secondly. That the indictment only ſtates, that the order was *ſhewn and delivered*, but does not ſtate that the money directed by the Juſtices to be paid was demanded, either before or after it was due; and being ordered to be paid "*week-*"*ly, and every week*," the defendant could not have been guilty of any diſobedience before the expiration of the firſt week; and therefore it ought to have averred, that the woman was alive at the end of the week.

R. v. Morſe, Trin. 25 Geo. 3. B. R.

Mr. *Law* contra. This being a demurrer to an *indictment*, no advantage can be taken of any want of form in the *caption*: and if advantage could be taken of any ſuch defects, the preſent objection would not be well founded, becauſe enough

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enough appears in the caption of this indictment to ſhew that the Seſſion was adjourned till *Thurſday the 6th of October:* for although in the former part of it the word July is erroneouſly inſerted, yet immediately afterwards it is ſtated, "That on the *ſaid Thurſday, the ſixth day of* "*October*, the ſame General Quarter Seſſions of "the Peace is holden *by adjournment as afore-* "*ſaid.*"

The Court.—It is a good objection, that by the caption of the indictment it appears that the Court had no juriſdiction; and upon a demurrer to an indictment, the Court muſt look into the *whole record*, to ſee whether they are warranted in giving judgment on it: it is therefore open to objections as well to the juriſdiction of the Court where the indictment was found, as to the ſubject matter of the indictment itſelf.

On the other point, the Court were of opinion, that the ſum which was ordered to be paid weekly was due at the beginning of the week; but whether a ſufficient *demand* was ſtated they gave no opinion.

CASE 158.

Trapſhaw's Caſe.

A houſe the whole of which is let out in lodgings, and has one outer door common to all its inmates is the manſion-houſe of it. ſeveral inhabitants.

AT the Old Bailey, in Auguſt Seſſion 1786, *William Trapſhaw* was convicted of breaking and entering the dwelling-houſe of *James Linnel*, in the day-time, *Frances* his wife being therein, and ſtealing ſeveral articles of wearing apparel, value 7*s.* and 4*d.* the property of the ſaid *James Linnel:* but the judgment was reſpited, and a queſtion ſubmitted to the conſideration of the twelve Judges, Whether, under the following circumſtances, the room broke open by the priſoner was well laid in the indictment to be the dwelling-houſe of *James Linnel?*

The houſe was ſituated in the Temple-Mews, and belonged to the *Earl of Radnor*, who let *the whole* of it out in lodgings. It was inhabited by three families, and had only one outer door, which was common to all the inmates. *James Linnel* rented the ground-floor, and a ſingle room up one pair of ſtairs. It was the parlour-door on the ground-floor that was broke open, and the things mentioned in the indictment were taken from that room.

The Judges aſſembled at Lord *Loughborough*'s Chambers on the firſt day of Hilary Term, to conſider this caſe; and at the Old Bailey, in the February Seſſion following, Mr. Juſtice *Gould* publicly delivered their opinion.

Mr. Juſtice *Gould*.—The indictment upon which this queſtion ariſes, is founded on the ſecond part of that clauſe of the ſtatute 3 and 4 Will. and Mary, c. 9. ſ. 1. which enacts, "That "all

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" all and every perſon or perſons that ſhall at any " time *rob* any other perſon, or ſhall feloniouſly " take away any goods or chattels being in any " dwelling-houſe, the owner or any other per- " ſon being therein, and put in fear; or *ſhall* " *rob any dwelling-houſe in the day-time, any per-* " *ſon being therein;* or ſhall comfort, aid, abet, " aſſiſt, counſel, hire, or command any perſon " or perſons to commit any of the ſaid offences; " or to break any dwelling-houſe, ſhop, or " warehouſe thereunto belonging, or therewith " uſed in the day-time, *and feloniouſly take away* " *any money, goods, or chattels of the value of five* " *ſhillings* or upwards, therein being, although " no perſon ſhall be within ſuch dwelling-houſe, " ſhop, or warehouſe; or ſhall counſel, hire, or " command any perſon to commit any burglary; " ſhall not have the benefit of his or their cler- " gy." The word *rob*, in a legal conſtruction, always includes the idea of *force and violence;* and although this part of the ſtatute does not expreſly ſignify that *breaking and entering* the houſe is neceſſary to conſtitute the crime, yet it has always been held upon this ſtatute, as well as upon other Acts of Parliament penned in the ſame manner, that thoſe ingredients are *ex vi termini* included in, and implied by, the word *Rob.* It is therefore eſſential to conſider what degree of breaking and entering is neceſſary; and it is ſettled in a variety of determinations upon the ſtatutes relating to this ſubject, that the breaking muſt be of a *dwelling-houſe*, in the ſame way as would be neceſſary to conſtitute the crime of burglary upon the rules of the common law; the only difference between the two offences being, that burglary muſt be committed in a dwelling-houſe in the night-time, and this offence muſt be

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be committed in a dwelling-houſe by day. The next conſideration therefore is, what ſhall be conſidered as a dwelling-houſe within the meaning of this Act of Parliament. In Mich. Term 1773, a caſe on a conviction of burglary was determined by the Judges, the circumſtances of which were analogous to the preſent caſe. The owner of the houſe had let *the whole* of it to different lodgers. The proſecutor rented a room on the firſt floor, a ſhop and a parlour on the ground-floor, and a cellar underneath the ſhop, at 12*l.* 1*cs.* a year. The owner took back the cellar to keep lumber in, for which he allowed the proſecutor a rebate out of his rent of 10*s.* a year. The entrance was into a paſſage by a door from the ſtreet, and on the ſide of the paſſage one door opened into the ſhop and another into the parlour; and beyond the parlour was the ſtair-caſe, which led to the uper appartments. The ſhop and parlour doors were broke open; and the Judges determined that theſe rooms were properly laid to be the dwelling-houſe of the proſecutor; for it could not be called the manſion of the owner, as he did not inhabit any part of it, but only rented the cellar for the purpoſes before-mentioned. And the number of houſes, eſpecially in the metropolis, which are in a ſimilar ſituation, muſt have been left entirely unprotected againſt burglary, had it been determined that the apartments of lodgers were not their dwelling-houſes, when the owner has, as it were, abandoned the dwelling himſelf, and left the whole houſe to their enjoyment and poſſeſſion. In February Seſſion 178:, the caſe of *the King v. Carrol* for burglary, was reſerved by Mr. *Recorder*. The houſe belonged to one *Naſh*, who had let *the whole* of it in ſeparate tenements. The proſecutor, as tenant at will to *Naſh*, rented a ſleeping-room up one

The King v. Rogers, ante, p. 90.

The K. v. Carrol, ante, p. 230.

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one pair of ſtairs, and a workſhop in the garret. The door of this workſhop was broke open; and the queſtion was, Whether it could be conſidered as the manſion of the proſecutor? According to my note of this caſe, the Judges were unanimouſly of opinion in the affirmative; and they relied upon *the King v. Rogers* as a caſe in point. I have indeed ſeen a memorandum of the ſame caſe by Mr. Juſtice *Buller*, in which he takes notice, that only ten of the twelve Judges were of this opinion; and from the known accuracy of that learned Judge I muſt preſume the fact was as he ſtated it: but I have no recollection that either *he* or Mr. Baron *Eyre* diſſented at the time from the opinion of the other Judges. In the preſent caſe, however, all the Judges are of opinion, That the two determinations which I have recited are preciſely in point; and that the preſent indictment properly charges the room broke open to be the dwelling-houſe of *James Linnel*. The reaſon of this opinion becomes evident, the moment it is ſtated. The owner of the houſe is, if I may ſo expreſs myſelf, the Lord of it; but having relinquiſhed every part of it to the habitation of others, it cannot with any propriety be conſidered as *his* manſion or dwelling-houſe. The entirety which reſides with him is ſplit into ſeveral poſſeſſions; and every ſeparate apartment, being in a diſtinct and ſeveral occupation, is the diſtinct manſion-houſe of its reſpective poſſeſſor.

The priſoner accordingly received ſentence of death.

CASE 159.

White's Caſe.

A perſon who has no notion of *eternity* cannot be examined as a witneſs.

ON the trial of an indictment for horſe-ſtealing at the Old Bailey, in October Seſſion 1786, *Thomas Atkins* was called as a witneſs to ſupport the proſecution.

Being examined on the *voir dire*, he ſaid, that he had heard there was a God, and believed that thoſe perſons who told lies would come to the gallows; but acknowledged that he had never learned the catechiſm, was altogether ignorant of the obligations of an oath, a future ſtate of rewards and puniſhments, the exiſtence of another world, or what became of wicked people after death.

The Court rejected him, as being incompetent to be ſworn (*a*).

(*a*) In the caſe of Omichund v. Barker, in Ch. Mich. Term, 1744, on a queſtion determined by Ld. *Hardwicke*, *Lee* C. J. *Willes* C. J. and *Parker* C. B. as to the admiſſibility of the evidence of a *Gentoo*, it was ſaid by *Willes* C. J. and agreed by the Court, that perſons who do not believe in God, or that there is a future ſtate of rewards and puniſhments, clearly ought not to be admitted as witneſſes. 1 Atkins, 45.

CASE 160.

The King *againſt* Moffatt.

A bill of exchange under the *ſum*, and not in the *form* required by the ſtatute 17 Geo. 3. c. 30. cannot be the ſubject of a *capital* forgery.

AT the Old Bailey, in January Seſſion 1787, *John Moffatt* was indicted on the ſtatute 2 Geo. 2. c. 25. and 7 Geo. 2. c. 22. before *James Adair*, Eſq; Recorder, for forging a bill of exchange, to the following purport:

" Sir,

MOFFATT'S CASE.

"SIR,

"*Navy-Office, 21ſt December* 1786.

"Seven days after date, pleaſe to pay to Mr. "*John Moffatt*, or his order, the ſum of three "pounds three ſhillings, and place the ſame to "the account of

"WALTER STERLING."

"To *George Peters*, Eſq.
"*Bank of England.*"

"*Accepted G. Peters*," and

"Indorſed, "*John Moffatt*, now Surgeon of the "Scipio Guard-Ship at Sheerneſs."

He was charged with having forged the acceptance of the ſaid *George Peters*, and with uttering the ſame knowing it to be forged; and the ſeveral offences were laid to be committed with an intention to defraud, 1ſt, *William Bell;* and 2dly, *George Peters*.

On producing the note in evidence, an objection was taken in favour of the priſoner by a gentleman at the bar *(a)*, that it was not ſtamped purſuant to the ſtatutes of 23 Geo. 3. c. 49. and 24 Geo. 3. ſ. 1. c. 7. and therefore could not be admitted in evidence. But the Court over-ruled this objection, upon the authority of *the King v. Hawkeſwood*, at Worceſter Aſſizes 1783 *(b)*; and *Lee's Caſe*, in this Court, in January Seſſion 1784; and the Jury found the priſoner guilty, ſubject to the opinion of the twelve Judges upon the following caſe.

(a) Mr. Knowlys.

(b) Ante, page 246.

By

MOFFATT'S CASE.

By the ſtatutes of 15 Geo. 3. c. 51. and 17 Geo. 3. c. 30. (which continued in force until the end of the Seſſion of Parliament during which the forgery was committed) it is enacted, "That "all promiſſory or other notes, *bills of exchange*, "or draughts, or undertakings in writing, being "negotiable or transferable for the payment of "*twenty ſhillings*, or any ſum of money above "that ſum and leſs than *five pounds*, or on "which twenty ſhillings, or above that ſum "and leſs than five pounds, ſhall remain undiſ-"charged, or which ſhall be iſſued in *England*, "ſhall ſpecify the names and places of abode of "the perſons reſpectively to whom or to whoſe "order the ſame ſhall be made payable; and "ſhall bear date before or at the time of draw-"ing or iſſuing thereof, and not on any day ſub-"ſequent thereto; and ſhall be made payable "within the ſpace of twenty-one days next after "the date thereof; and ſhall not be transferable "or negotiable after the time thereby limited for "the payment thereof; and that every *indorſe-"ment* to be made thereon, ſhall be made before "the expiration of that time, and to bear date at "or not before the time of making thereof; and "ſhall ſpecify the name and place of abode of "the perſon or perſons to whom or to whoſe or-"der the money contained in every ſuch note, "*bill*, draught, or undertaking, is to be paid; "and that the ſigning of every ſuch note, *bill*, "draught or undertaking, and alſo every ſuch "indorſement, ſhall be atteſted by one ſubſcrib-"ing witneſs at leaſt; and which ſaid notes, *bills "of exchange*, or draughts, or undertakings in "writing, may be made or drawn in words to "the purport or effect as ſet out in the ſchedule

"hereunto

MOFFATT'S CASE.

" hereunto annexed *(a)*; and that all promiſ-
" ſory or other notes, *bills of exchange*, or draughts,
" or undertakings in writing, being negotiable
" or transferable for the payment of *twenty ſhil-*
" *lings*, or any ſum of money above that ſum
" and leſs than *five pounds*, or on which twenty
" ſhillings, or above that ſum and leſs than five
" pounds, ſhall remain undiſcharged, and which
" ſhall be iſſued in *England* in any other manner
" than as aforeſaid; and alſo every indorſement
" on any ſuch note, *bill*, draught, or undertak-
" ing, to be negotiated under this act other than
" as aforeſaid; ſhall, and the ſame are hereby
" declared to be *void*, any law, ſtatute, uſage,
" or cuſtom to the contrary thereof in any wiſe
" notwithſtanding." The ſtatutes then impoſe a penalty of not leſs than *five pounds*, nor more than *twenty pounds*, on any perſon who ſhall *utter*, *publiſh*, or *negotiate* notes, *bills of exchange*, &c. contrary to the method above preſcribed. But by the preamble theſe clauſes are not to operate in prejudice to the negotiation of promiſſory notes, and inland *bills of exchange* for the remittance of money in diſcharge of any ballance of account, or other debt.

Place, *Day*, *Month*, *Year*.

(*a*) TWENTY-ONE days after date pay to *A. B.* of (*Place*) or his order, the ſum of Value received, as adviſed by
To *E. F.* of (*Place*). *C. D.*
Witneſs *G. H.*

The indorſement *toties quoties*.

Day, *Month*, *Year*.

Pay the contents to *J. K.* of (*Place*) or his order,
Witneſs *L. M.* *A. E.*

N. B. There is another form mentioned in the Act for *promiſſory notes*.

The

MOFFATT'S CASE.

The queſtion referred to the Judges was, Whether if the bill of exchange ſet forth in the indictment is void by the above ſtatutes, the forging of it can become the ſubject of a capital offence within the meaning of the ſtatutes of 2 Geo. 2. c. 25. and 7 Geo. 2. c. 22.?

In February Seſſion 1787, Mr. Juſtice *Gould* ſignified, that the Judges had taken this caſe into their conſideration, but that they thought it a ſubject which required further deliberation; and in the May Seſſion following, Mr. Juſtice *Aſhhurſt* delivered their unanimous opinion, That as the forgery was committed before the expiration of the ſtatutes of 15 Geo. 3. c. 51. and 17 Geo. 3. c. 30. *(a)*, the bill of exchange, if real, would not have been valid or negotiable; and therefore the forging of it was not a *capital offence*.

(*a*) They are now made perpetual by 27 Geo. 3. c. 16.

CASE 161.

Francis Parr's Caſe.

Obtaining and indorſing a dividend warrant at the Bank in the name of a ſtockholder, is "perſonating a proprietor, and *thereby* endeavouring, to receive the dividend," although no attempt whatever is made to receive the money at the Pay-Office. 2 Strange, 728.

AT the Old Bailey, in January Seſſion 1787, *Francis Parr* was tried before Mr. Serjeant *Adair*, *Recorder*, on the ſtatute 31 Geo. 2. c. 22. ſ. 77. for perſonating *Iſaac Hart*, of *Windſor*, the true and real proprietor of and in 3900l. capital ſtock, and *thereby* falſely *endeavouring* to receive from the Governor and Company of the Bank of England the ſum of 58l. 10s. as and for half-an-year's annuity, as if HE was the ſaid true and lawful owner of the money.

It

PARR'S CASE.

It appeared in evidence, that the priſoner applied to Mr. *George*, the dividend payer of the three *per cent.* Conſols at the Bank, for the dividend on 3900l. ſtock, in the three *per cent.* Conſols, amounting to 58l. 10s.

The application was in the following form:—The priſoner ſaid, "*Iſaac Hart* 3900l." Mr. *George* aſked, "*Of what place?*" The priſoner replied, "*Of Windſor.*" Mr. *George* then gave the priſoner a dividend warrant for the ſum of 58l. 10s. which the priſoner indorſed in the name *Iſaac Hart.*

In order to receive the money upon a dividend warrant, it is neceſſary for the bearer of it to apply to the Pay-Office, which is ſituated at ſome diſtance from the office in which the warrants are delivered out; but it was in proof that the priſoner, inſtead of attempting to receive the money at the Pay-Office, had walked a different way with the warrant in his pocket, and no attempt was in fact ever made to receive it; for the priſoner was apprehended in about ten minutes after he had procured the warrant, as he was ſtanding unconcerned in the Rotunda of the Bank.

It was contended in favour of the priſoner (a), that this evidence did not maintain the charge in the indictment, or ſatisfy the meaning of the ſtatute on which it was founded. The Legiſlature, they ſaid, had made two diſtinct and independent acts neceſſary to be performed before the offence could be compleated. FIRST, That the true and real proprietor of the ſtock ſhould be perſonated. SECONDLY, That the perſon perſonating the proprietor ſhould endeavour to receive the money.

(a) Mr. Morgan, Mr. Knowlys.

The

PARR'S CASE.

The words of the ſtatute are, that "if any "perſon or perſons whatſoever ſhall falſely and "deceitfully perſonate any true and real proprie- "tor of the ſhare or ſhares, or any part of any "ſhare or ſhares, annuities, or dividends, of or "in ſuch capital ſtock or funds as have been eſ- "tabliſhed by the authority of Parliament, ſince "the paſſing of the ſtatute of the 8 Geo. 1. c. 22. "and thereby transferring or endeavouring to "transfer the ſtock, or receiving or endeavour- "ing to receive the money of ſuch true and law- "ful proprietor, as if ſuch offender were the "true and lawful owner thereof; then every ſuch "perſon or perſons ſhall be deemed guilty of "felony, and ſuffer death as a felon without be- "neſit of clergy."

In obtaining the warrant, the priſoner has certainly compleated the firſt act which the ſtatute mentions, of perſonating the true and real proprietor of the ſtock; by which means he was enabled to perform the other requiſite to the completion of the offence, *viz.* endeavouring to receive the money. The mere act of obtaining the warrant cannot be conſtrued an endeavour *thereby* to receive the money; becauſe it is the inſtrument only by the means of which the endeavour is afterwards to be made. They are two diſtinct and ſeparate acts. The warrant furniſhed the means of receiving the money; but if the party does not by the uſe of thoſe means endeavour to receive the money, he has barely procured the means of compleating the offence, but it cannot be ſaid that he has *thereby* endeavoured to receive it. If the priſoner had gone to the Pay-office and tendered the warrant, or prepared, or ſhewed any deſign or intention ſo to do, it would have been an

an endeavouring thereby to receive the money; but inſtead of uſing any endeavour for this purpoſe, he ſilently put the warrant in his pocket, and walked a different way, without doing any act, or diſcovering the leaſt intention to compleat the offence. It is evident from the preamble and general ſcope of the Act of Parliament, that it was intended to prevent the property veſted in the Funds from being tortiouſly obtained by thoſe who have no title to it; and to compleat the offence the act done muſt be ſuch as would effectuate the miſchief which the Legiſlature intended to prevent. No act therefore, from which that miſchief would not immediately and unavoidably reſult, can be conſidered within the meaning of the ſtatute. An interval is afforded for repentance to interpoſe between the two acts of perſonating the proprietor, and endeavouring to receive the money; and if during the progreſs of completion, the final perpetration of the crime is prevented, either by the ſuggeſtions of conſcience or by premature detection, the offender cannot be found guilty; for the crime though commenced is not compleated. PARR's CASE.

The Court were of opinion, That the act of perſonating the proprietor, and thereby obtaining the warrant to receive the dividend, was evidence of an endeavouring to receive the money; and the facts of the caſe being left with the Jury, they found the priſoner *Guilty*; but on account of the importance of the queſtion, and of the different manner in which this ſtatute is penned from ſome others on the ſame ſubject, it was thought proper to reſpite the judgment, and to refer the point of law to the determination of the twelve Judges. 9 Geo. 1. c. 12. 9 Geo. 2. c. 34. 11 Geo. 2. c. 27. 1 Hawk. 207.

Mr.

PARR's CASE.

Mr. Juſtice *Gould* in the February Seſſion following, after ſtating the form of the indictment, the facts that were given in evidence, and the words of the ſtatute, delivered the opinion of the Judges to this effect:

This caſe has been taken into conſideration by all the Judges, and has been attended to with deep and ſerious deliberation; and it is their unanimous opinion, That the manner in which the priſoner applied to the Officer of the Dividend-Office at the Bank and obtained the warrant, was a perſonating of *Iſaac Hart*, the true and lawful proprietor of the ſtock; and that the priſoner thereby endeavoured to receive the money of *Iſaac Hart* within the true intent and meaning of the Act of Parliament. If he had actually received the money, he would have accompliſhed the miſchief againſt which the Legiſlature intended to guard; and then no poſſible doubt could have exiſted with reſpect to his guilt. The Legiſlature therefore has ſagaciouſly and wiſely attempted to prevent the miſchief, by enacting that no perſon ſhall endeavour, or take any ſteps towards obtaining the money which others have lodged in the Funds. The queſtion therefore is, Whether the priſoner did take any ſteps for this purpoſe? And the Jury have found that he came forward, perſonated, and aſſumed the name of a real proprietor. He called himſelf *Iſaac Hart*. He wrote the name *Iſaac Hart* in the Bank-book. The dividend warrant is made out in that name, and in that name the priſoner indorſed it; by which indorſement any perſon who ſhould be the bearer of it, was intitled to receive the dividend at the Pay-Office. This ſtatement of the facts alone, without uſing any argument,

argument, is ſufficient to ſhew that the priſoner, by perſonating the proprietor, and by obtaining and indorſing the warrant, thereby made an endeavour, as far as it went, towards receiving the dividend. The Judges therefore are unanimous, That the evidence ſupported the charge, and that the priſoner is legally convicted, within the meaning of this Act of Parliament. PARR's CASE.

The priſoner received ſentence of death at the cloſe of the Seſſion, and was executed accordingly.

CASE 162. ## The King *againſt* Aickles.

A perſon who has for many years been known by a name which was not his own, and afterwards aſſumes his real name, and in that name draws a bill of exchange, is not guilty of forgery, though the bill was drawn for the purpoſes of fraud.

AT the Old Bailey, in February Seſſion 1787, *John Henry Aickles* was indicted before Mr. Juſtice *Groſe*, for forging a certain promiſſory note for the payment of money, with intent to defraud *Robert Harvey Gedge*.

There was alſo a ſecond count, for uttering it knowing it to be forged, with the like intention. The form of the note was as follows:

"£. 25 10 0. London, 18*th December* 1786.

"Three Months after date, I promiſe to pay "to *Henry Byron*, Eſq; or order, twenty-five "pounds ten ſhillings, for value received.

"*No.* 4. *Argyle-ſtreet*, "JOHN MASON."
"*Oxford-road.*"

Henry Byron, the payee of the note, went to the ſhop of Mr. *Gedge*, a linen-draper in Leiceſter-fields, and having looked out ſeveral pieces of goods to the amount of twenty guineas, he preſented the note above deſcribed in payment. Mr. *Gedge* aſked *Byron*, who *John Maſon* the drawer of it was. *Byron* anſwered, "He is a gentleman "of conſiderable fortune, with whom I am con-"cerned in the profits of a coal-mine; and he "lives at N° 4, Argyle-ſtreet, Oxford-road." Mr. *Gedge*, however, refuſed to take the note until he had enquired into its validity; and *Byron* very readily left the note with him *unindorſed* for that purpoſe, deſiring that he would not ſend the goods until he was perfectly ſatisfied. Mr. *Gedge* accordingly ſent his ſervant to N° 4, Argyle-

gyle-ſtreet, where he was introduced to the priſoner as Mr. *Maſon*. The priſoner, on being ſhewn the note, ſaid that the name *John Maſon* was his hand-writing, and that it would be punctually paid when due; but before Mr. *Gedge* had parted either with the note or with the goods, Mr. *Byron* was apprehended for defrauding a hoſier, and Mr. *Aickles* for having returned from tranſportation before his time. The priſoner had taken the houſe in Argyle-ſtreet about a month before he was apprehended, in the name of *John Maſon*; and had ſigned a written agreement in *that name* with his landlord, who had enquired his character in *that name*, at a coffee-houſe in Round-court in the Strand. He was alſo known by the name of *John Maſon* where he had before lodged; and he alledged in his defence, that *John Maſon* was his *real name*, but that he had been known for three years by the fictitious name of *John Henry Aickles*; and he had reaſſumed his *real name* for the purpoſe of avoiding the detection to which the longer uſe of his *fictitious name* would unavoidably have expoſed him.

It was contended by a gentleman at the bar, in behalf of the priſoner, that theſe facts did not amount to the crime of forgery, for that the law required the act to be done in the name of *another* perſon.

The Jury found the priſoner guilty; and they added, that they believed the name of *Maſon* was aſſumed for the purpoſe of negotiating the note in confederacy with *Henry Byron*, but that the name he was beſt known by was *John Henry Aickles*.

AICKLES' CASE. The judgment, however, was reſpited, and the caſe referred to the conſideration of the twelve Judges.

Mr. Juſtice *Aſhhurſt*, in May Seſſion 1784, ſaid, "The Judges have been conſulted upon the "law of this caſe; and they are of opinion, "That *under the particular circumſtances which* "*occurred in evidence*, the indictment is not "maintainable, and therefore the judgment muſt "be ſtaid."

Vide ante, 330. The priſoner, having been tried in the former part of the Seſſion for returning from tranſportation, and acquitted, was remanded under his former ſentence.

CASE 163. ## The Caſe of George Bath and others.

A ſentence of tranſportation may be a ſecond time paſſed upon a priſoner, although the term for which he was before tranſported is unexpired.

AT the Old Bailey, in February Seſſion 1787, *George Bath*, *William Bateman*, *Thomas Warner*, and *Michael Doyle*, were convicted before Mr. *Baron Thompſon* of grand larceny, and received ſentence to be tranſported for the term of ſeven years.

At the enſuing Lent Aſſizes at *Guildford* for the county of *Surrey*, the ſame *George Bath*, *William Bateman*, and *Thomas Warner*, were tried before Mr. Baron *Thompſon*, on the ſtatute 24 Geo. 2. c. 45. for ſtealing to the amount of forty ſhillings on a navigable river; and the Jury found

George

George Bath guilty of the ſingle felony, and acquitted the other priſoners. BATH'S CASE.

The Court doubted, Whether they could paſs ſentence of tranſportation upon *George Bath* a ſecond time? and his judgment was accordingly reſpited.

This was ſaid to be a new caſe, and it was mentioned to the Judges ſeparately, but never received their collective conſideration.—The priſoner, however, received ſentence, at the enſuing Aſſizes for the county of Surrey, to be tranſported for the term of ſeven years.

CASE 164.

Priddle's Case.

A perſon convicted on an indictment of conſpiracy cannot be a witneſs.

Kely, 33, 37.
2 Bulſt. 154
Raym. 32
Co. Lit. 6.
1 Hale, 306.
2 Hale, 277.
2 Salk. 689.
5 Mod. 15, 76.
Skyn. 578
2 Wilſ 18.
Gilb. L. E. 139
Eden, P. L. 61.
2 Hawk. 609.

WILLIAM PRIDDLE, *Robert Holloway*, and *Stephen Stephens*, were convicted at the Old Bailey, in April Seſſion 1787 of conſpiracy; and ſentenced to pay a fine of 6s. 8d. each, and to be impriſoned in his Majeſty's gaol of Newgate, *viz.* *William Priddle*, for the term of two years, and *Robert Holloway* and *Stephen Stephens* for the term of eighteen months.

During the courſe of their confinement, *George Croſsley*, againſt whom they had been convicted of conſpiring, was indicted at Hicks's Hall for wilful and corrupt perjury; and the indictment being removed into the Court of King's Bench, came on to be tried before Mr. Juſtice *Buller*, at the ſittings at Weſtminſter after Trinity Term 1787.

At the trial, *William Priddle* was produced as a witneſs on the part of the proſecution; and being examined on the *voir dire*, he acknowledged that he had been convicted of the conſpiracy abovementioned, and was then brought up under a *Habeas Corpus* from his confinement for that offence.

The defendant's Counſel objected to his being examined, and ſubmitted to the Court, that a conviction of conſpiracy rendered the party infamous, and deſtroyed his competency as a witneſs.

Mr. Juſtice *Buller*. Conſpiracy is a crime of a blacker dye than barratry, and the teſtimony of a perſon

a perſon convicted of barratry has been rejected. It is now ſettled, that it is the infamy of the crime which deſtroys the competency, and not the nature or mode of puniſhment. A conviction therefore of any offence which is comprehended under the denomination of *crimen falſi*, deſtroys the competency of the perſon convicted, as perjury, forgery by the common law, &c.

PRIDDLE'S CASE.

The teſtimony of the witneſs was rejected (*a*).

(*a*) In Hilary Term 28 Geo. 2. in B R. a caſe, reſerved at the Aſſizes for Kent on the trial of an ejectment, was argued.—The queſtion was, Whether *Joſeph Jeffry*, one of the three ſubſcribing witneſſes to the will of *John Mackender*, was a competent witneſs, within the ſtatute of frauds; he having been convicted and whipped for petty larceny. The Court determined that he was not, becauſe both his crime and his puniſhment were infamous; but they laid it down as a rule, that it is the crime which creates the infamy, and takes away a man's competency, and not the puniſhment for it. *Pendock v. Mackender*, 2 Wilſ. 18. See alſo 5 Mod. 75.

John Thompſon's Caſe.

CASE 165.

AT the Lent Aſſizes for *Newcaſtle* in the year 1787, *John Thompſon* was indicted before Mr. Juſtice *Heath*, on the ſtatute 5 Eliz. c. 4. for ſtealing a ſilver watch, the property of *John Simpſon*, privately from his perſon and without his knowledge.

Goods privately ſtolen from the perſon of a captain of a ſhip while he is aſleep in his cabin, is within the 5 Eliz. c. 4.

It appeared in evidence, that the priſoner had ſtolen the watch mentioned in the indictment from the perſon of the proſecutor, a maſter of a ſhip then lying in the river *Tyne*, while he was aſleep in his cabin, privately and without his knowledge.

The

THOMPSON'S CASE.

The Jury found the priſoner guilty of the offence as laid in the indictment, and the learned Judge paſſed ſentence of death upon him; but the Counſel for the proſecution having very candidly produced a caſe decided at *Durham* ſome years ago, where it was *ruled*, that the ſtatute does not extend to protect perſons aſleep, the execution of the ſentence was reſpited, and the caſe reſerved for the opinion of eleven Judges, againſt the opinion of Mr. Juſtice *Gould*.

See Gribble's Caſe, ante, 233, 234.

The Judges were of opinion, That the conviction was right (*a*).

(*a*) In June Seſſion 1788, *Edward Willan* was indicted before Mr. *Serjeant Adair*, *Recorder*, for privately ſtealing from the perſon of *Stephen Bolton*, a waggoner, while he lay aſleep on ſome ſtraw in the ſtable of his Inn. An objection was taken by the priſoner's Counſel, that as the proſecutor was aſleep, it was not a caſe within the 5 Eliz. c. 4. But the Court ſaid, That whatever notions might have prevailed heretofore on this ſubject, it had been otherwiſe determined by all the Judges of England, in two late caſes; the one from *Briſtol*, reſerved by *Richard Burke*, *Eſq.* Recorder of that city; and the other from *Newcaſtle*, reſerved by Mr. Juſtice *Heath*.

N. B. The Twelve Judges of England will not receive a reſerved caſe from any Recorder, except the Recorder of London.

Hammond's

Hammond's Caſe.

CASE 166.

What ſhall be conſidered as "*ſending* a threatening letter knowingly in contravention" within the meaning of the ſtatute creating that offence.

AT the Old Bailey, in May Seſſion 1787, *John Hammond* and *Mary Hammond* were indicted before Mr. Juſtice *Aſhhurſt*, preſent Mr. Baron *Perryn*, on the ſtatutes 9 Geo. 1. c. 22. and 27 Geo. 2. c. 15. for ſending a threatening letter to *Daniel Dancer*, demanding the ſum of ten pounds.

The indictment conſiſted of twelve counts, ſome of which charged, that the priſoners *ſent* and *delivered* the ſaid letter; and others, that they cauſed it to be *ſent* and *delivered*.

It appeared in evidence, that *Mary Hammond* had *written* the letter in queſtion; and that it was *delivered* to the proſecutor by *John Hammond*, who ſaid he had found it in the proſecutor's garden. The priſoners were huſband and wife, and they lived in the proſecutor's houſe in the character and capacity of ſervants; but there was no evidence that *John Hammond* had any knowledge of the contents of the letter.

The 9 Geo. 1. c. 22. enacts, "That if any "perſon or perſons ſhall knowingly *ſend* any let- "ter without any name ſubſcribed thereto, or "ſigned with a fictitious name or names, de- "manding money, veniſon, or other valuable "thing, ſuch offender ſhall ſuffer death without "benefit of clergy."

The 27 Geo. 2. c. 15 enacts, "That if any "perſon or perſons ſhall knowingly *ſend* any let- "ter without any name ſubſcribed thereto, or "ſigned

HAMMOND'S CASE.

" ſigned with a fictitious name or names, letter " or letters, threatening to kill or murder any of " his Majeſty's ſubjects, or to burn their out- " houſes, barns, ſtacks of corn or grain, hay or " ſtraw, though no money or veniſon, or other " valuable thing, ſhall be thereby demanded, " every ſuch offender ſhall ſuffer death without " benefit of clergy."

It is alſo enacted, by 30 Geo. 2. c. 24. " That " all perſons who ſhall knowingly *ſend or deliver* " any letter or writing with or without a name " or names ſubſcribed thereunto, or ſigned with " a fictitious name or names, letter or letters, " threatening to accuſe any perſon of any crime " puniſhable by law with death, tranſportation, " pillory, or other *infamous* puniſhment, with a " view or intent to extort or gain money, goods, " wares, or merchandizes, from the perſon or " perſons ſo threatened to be accuſed, ſhall be " deemed offenders againſt law and the public " peace; and the Court before whom he ſhall be " convicted, may order ſuch offender to be fined " and impriſoned; or put in the pillory; or pu- " blicly whipped; or to be tranſported accord- " ing to the laws made for tranſportation of " *felons*."

Mr. Shepherd, Mr. Schoen.

The Counſel for the priſoner ſubmitted to the Court, That the offence deſcribed by the ſtatutes 9 Geo. 1. c. 22. and 27 Geo. 2. c. 15. on which the indictment was founded, conſiſted in " *know-* " *ingly ſending*" a threatening letter; but that the evidence only proved that *Mary Hammond* had *written* the letter in queſtion, and that *John Hammond* had *delivered* it; and that there was no proof whatever of its having been in any way whatever *ſent* to the proſecutor.

The

HAMMOND'S CASE.

The Court thought the objection, as to the definition of the offence, well founded. In all cases, they ſaid, ſo highly penal as the preſent caſe is, it is certainly neceſſary not only to conſider the intention of the Legiſlature, but to bring the offender within the words of the Act of Parliament itſelf. The act of merely writing a threatening letter will not conſtitute this offence; for unleſs the writer or contriver of ſuch a letter afterwards *ſend* it to the party whoſe fears the threat it contains was calculated to alarm, it cannot poſſibly produce the miſchief which the Legiſlature intended alone to ſuppreſs; and they have accordingly adapted the words of both the ſtatutes to that exigency, *viz.* "if any perſon ſhall *ſend* any "ſuch letter, they ſhall be guilty of felony," &c. Now it is impoſſible to conceive, that *carrying* a letter can by any conſtruction be comprehended under the words "*ſend* any letter," which are the preciſe terms in which the ſtatutes are penned. There can be no doubt, however, if the Legiſlature at the time they paſſed theſe Acts, had been aſked, Whether the "*carrying* a threatening let-"ter," or, to make it more like the preſent "caſe, "*delivering* a threatening letter," was an offence which they meant to puniſh, and of the ſame kind as that which they had deſcribed by the words "*ſending* a threatening letter," but that they would have anſwered without doubt or heſitation in the affirmative. The Judges however are not to conſider what the Legiſlature would have done in certain caſes, but to look at the words they have uſed, and to conſtrue them according to the meaning which it is moſt likely they entertained at the time the ſubject was under their conſideration. Now at the time theſe ſtatutes paſſed, it ſeems that the Legiſlature never had

HAMMOND'S CASE.

had it in contemplation that any perſon would be the *carrier* of a threatening letter which he himſelf had written or contrived. They undoubtedly conceived that ſuch a letter would be *ſent* by the poſt, or by ſome other *ſecret* conveyance, ſo as to prevent the object of it from diſcovering the perſon from whom it was ſent.

It is clear therefore that the act of delivering a threatening letter is not the offence deſcribed in the ſtatutes of 9 Geo. 1, c. 22. and 27 Geo. 2, c. 13. But if any doubt could be entertained upon this ſubject, the Legiſlature itſelf has removed it; for by a ſubſequent Act of Parliament, 30 Geo. 2. c. 24. the offence of *delivering*, as well as *ſending* a threatening letter, is made a *miſdemeanour*, puniſhable in the diſcretion of the Court, according to the circumſtances of the caſe. This ſtatute makes it evident, that where the Legiſlature intended that a particular act ſhould become an eſſential ingredient in creating the offence, they knew how to make uſe of proper words to expreſs that intention; and affords incontrovertible proof, that they had it not in contemplation to make the *delivery* of a threatening letter *felony*, at the time the ſtatutes on which the preſent indictment is founded were paſſed. But there is ſtill a queſtion in this caſe for the conſideration of the Jury; for though *Mary Hammond* is the wife of the other priſoner, yet if the Jury are of opinion that ſhe wrote the letter herſelf, without any interference of her huſband, and *ſent* it by him, without his knowing any thing of the contents, to the proſecutor, ſhe alone may be found *Guilty*; but otherwiſe, both the priſoners muſt be acquitted.

The

The learned Judge left it accordingly to the Jury, and they found both the priſoners *Not Guilty*. HAMMOND'S CASE.

John Cogan's Caſe.

CASE 157.

AT the Old Bailey, in May Seſſion 1787, *John Cogan* was indicted on the ſtatute 2 Geo. 2. c. 25. *(a)*, for uttering and publiſhing as true a certain forged *Will and Teſtament*, purporting to be the laſt Will and Teſtament of *James Gibſon*, &c.

A priſoner acquitted of forgery on a variance between the inſtrument produced in evidence and that recited in the indictment, cannot plead *autre fois acquit* to another indictment for the ſame offence, except the inſtrument be again miſrecited in the ſame manner.

The will produced in evidence began thus: "*James Gibſon* do hereby," *&c.* leaving out the pronoun of the firſt perſon. The will recited in the indictment began with the pronoun, "*I James* "*Gibſon* do thereby," *&c.*

The Court held this variance fatal to the validity of the indictment, and the priſoner was of courſe *acquitted*.

(*a*) The reaſon of this indictment being on 2 Geo. 2. c. 25. inſtead of 31 Geo. 2. c. 10. ſ. 24. was, that *Gibſon* was not a Seaman on board a *King's ſhip*, but on board a *letter of marque* in merchant ſervice.

In the July Seſſion following he was again indicted before Mr. Juſtice *Wilſon*, preſent Mr. Serjeant *Adair*, Recorder, for falſely uttering and publiſhing as true a certain falſe, forged, and counterfeited

COGAN'S CASE.

counterfeited *Will and Teſtament*, with a certain mark thereto ſet, purporting to be the laſt Will and Teſtament of *James Gibſon*, late a Seaman on board the *Vigilant*, &c. which ſaid falſe, forged, and counterfeited Will and Teſtament is in the words and figures following; that is to ſay, "*James Gibſon* do hereby," *&c.* leaving out the pronoun "*I*," and reciting a *fac-ſimile* of the will.

The priſoner being put to the bar, on his arraignment pleaded *autre fois acquit*. The plea was taken *ore tenus*, and recorded by the Clerk of the Arraigns; who replied to it, on the part of the Crown, *nul tiel record*.

To prove THE PLEA the record of the priſoner's acquittal in May Seſſion was produced. On comparing it with the preſent indictment, it appeared, as above ſtated, that the priſoner had been acquitted of uttering a forged will, beginning, "I *James Gibſon* do hereby," *&c.* but that he was now indicted for uttering a forged will beginning, "*James Gibſon* do hereby," *&c.* The queſtion therefore was, Whether this record was legal evidence of his having been acquitted of the *ſame offence?* And after argument by the priſoner's Counſel, in which he chiefly relied upon Lord *Hale*'s *(a)* conſtruction of *Vaux's Caſe*, as reported by Lord *Coke (b)*, THE COURT rejected the proof as inſufficient; and the priſoner pleaded the general iſſue, over to the felony, and the Jury found him Guilty of the offence.

(a) 2 Hale, 246.
(b) 4 Co. 44. Co. P. C. 214.

During

COGAN's CASE.

A perſon may be indicted for forging a laſt will and teſtament, although the ſuppoſed teſtator is alive.

During the courſe of the trial *James Gibſon*, the ſuppoſed teſtator of the forged will, was produced and ſworn as an evidence on the part of the Crown. Upon this circumſtance a doubt aroſe, whether the priſoner had been legally convicted; the indictment charging him with having uttered or publiſhed as true a certain *Will and Teſtament* and there being no ſuch inſtrument, in contemplation of the law, as the *Will and Teſtament* of a man who is living, for until the death of a teſtator, his will cannot exiſt, either in fact or in law; and upon this doubt the judgment was reſpited, and the caſe referred to the conſideration of the Judges.

In June Seſſion 1788, the priſoner was put to the bar, and Mr. Juſtice *Wilſon* delivered the opinion of the Judges to the following effect.—The inſtrument which the law takes notice of under the name of *a Will*, is in a man's own power during his life, and therefore no inſtrument or writing is conſidered as a laſt will until the teſtator is dead. Upon the trial of this indictment it appeared that *James Gibſon*, whoſe will was charged to be forged, was alive, and produced as a witneſs; and I was in ſome doubt, whether, under theſe circumſtances, an inſtrument bearing the ſimilitude of a laſt will could be conſidered within the meaning of the ſtatute upon which the indictment is founded. The caſe was laid before the twelve Judges, and on mature deliberation they have decided, that the doubt was without foundation.

The fact of the priſoner's having uttered this will, knowing it was forged, was clearly proved at the trial. He told the Proctor, that *James Gibſon*,

COGAN's CASE. *Gibſon*, the ſuppoſed teſtator, was dead, and produced a letter to the ſame effect to corroborate the aſſertion. By this means he obtained a probate as the executor named in the will; and the Judges are all of opinion, that if a forged inſtrument *purporting* to be a laſt will and teſtament, be uttered and publiſhed as a true laſt will and teſtament, under circumſtances manifeſting an intention to defraud, it is equally within the meaning of the Act of Parliament, whether the ſuppoſed teſtator be in fact alive or dead. This opinion is founded on the authority of ſeveral caſes.

(a) Reported, 10 St. Tr. 183. In the year 1753, *Timothy Murphy (a)* was tried in this Court, for forging a Seaman's will; and though the man whoſe will was forged was alive, he was convicted and executed.

(b) Ante, page 103. In the year 1773, *John Stirling (b)* a ſtudent in the Temple, was tried in this Court for forging a will in the name of his Laundreſs, by which means he obtained a conſiderable ſum of money which was inveſted in her name in the public funds; and he was convicted and executed, tho' the Laundreſs was then alive.

(c) Reported in Foſter, p 116. In the year 1754, *Anne Lewis (c)* was indicted upon this ſtatute for uttering and publiſhing as true a forged Power of Attorney from *Elizabeth Tingle*, Adminiſtratrix of her father *Richard Tingle*, deceaſed, a Marine on board the Hector. It appeared that *Richard Tingle* had died childleſs; and a doubt was conceived, Whether, ſince there never was ſuch a perſon as *Elizabeth*, the daughter of *Richard Tingle*, the offence was forgery within the meaning of the ſtatute? and eleven of the

the Judges were of opinion, That as the inſtrument forged wore the appearance of a Power of Attorney, it was within the Act, notwithſtanding the deed which ſhe had publiſhed, was impoſſible to be true. COGAN'S CASE.

There is alſo another caſe, *the King v. Bolland (a)*, who was indicted in this Court for forging the indorſement on a promiſſory note in the name of "*James Banks*," whom he repreſented as a Wine and Brandy Merchant, living in Rathbone-Place; but in fact no ſuch perſon ever exiſted; and, upon the opinion of the Judges being taken, *Bolland* was executed. (a) Ante, page 83.

In conſequence of this determination the priſoner received judgment of death.

CASE 168.

Elizabeth Steel's Caſe.

A priſoner mute by the viſitation of God may be arraigned, tried, ſentenced, and tranſported.

Vide ante, page 347.

AT the Old Bailey, in May Seſſion 1787, the Grand Jury found a bill of indictment againſt *Elizabeth Steel* for ſimple grand larceny. On her arraignment ſhe refuſed to plead. The Court directed the Sheriff to return a Jury *inſtanter*, and they were ſworn to enquire whether ſhe ſtood mute of malice, or by the viſitation of God. The Jury returned a verdict, "Mute by the viſi- "tation of God." The priſoner was remanded, and the queſtion referred to the conſideration of the Judges, Whether, under theſe circumſtances, ſhe could be tried upon the indictment?

Bro. Cor. 101, 217. 8 Hen. 4. pl. 2 43 Aſſ. pl. 30. Cromp. J. 290.

In the Trinity Term following the Judges aſſembled at Serjeants Inn Hall, and they were of opinion, That a verdict finding a priſoner to be mute by the viſitation of God was not an abſolute bar to his being tried upon the indictment; for although a perſon *ſurdus & mutus à nativitate* is, in contemplation of law, incapable of guilt, upon a preſumption of ideotiſm, yet that preſumption may be repelled by evidence of that capacity to underſtand by ſigns and tokens, which it is known that perſons thus afflicted frequently poſſeſs to a very great extent (*a*). Great diligence and circumſpection, however, ought to be exerciſed in ſo critical a caſe; but if all means to convey intelligence to the mind of ſuch a priſoner reſpecting the nature of his arraignment ſhould prove ineffectual, the Clerk of the arraigns may enter the plea of Not Guilty; and then it is incumbent on the Court to enquire touching all thoſe points of which the priſoner might take advantage himſelf; to examine all the proceedings againſt him with

(*a*) See the caſe of Thomas Jones, tried in Dec Seſſ. 1773, before *Blackſtone* J. for a capital offence; when upon evidence of this capacity he was arraigned, convicted of ſingle felony, and received ſentence of tranſportation. See 2 Hale, 317.

with a critical eye; and to render him every ſervice conſiſtent with the rules of law. STEEL'S CASE.

In the October Seſſion following the priſoner was again put upon her arraignment. On being aſked by the Clerk of the Arraigns, Whether ſhe was *Guilty*, or *Not Guilty?* ſhe replied, "You "know I cannot hear."

The Court, upon a ſuppoſition that ſhe could hear, repeatedly explained to her the nature and effect of the opinion of the Judges; that it was in vain for her to attempt to elude her arraignment by pretended deafneſs; for as ſhe muſt at all events be tried for the felony ſhe was charged with, ſhe would loſe, by ſuch pretence, the advantage of aſking proper queſtions of the witneſſes. But all endeavours proving ineffectual, a Jury was again returned, and ſworn "Well "and truly to enquire whether *Elizabeth Steel*, "the priſoner at the bar, ſtands mute through "wilfulneſs and obſtinacy, or by the viſitation "of God." And the Jury again found a verdict, "Mute by the viſitation of God." The ſame Jury were immediately ſworn in chief, and charged to try the indictment. They found the priſoner Guilty; and at the cloſe of the ſeſſion ſhe received ſentence of tranſportation for the term of ſeven years (*a*).

(*a*) Lord Hale ſays, "But what if all this be found againſt the priſoner, what ſhall be done? Whether judgment of *death* ſhall be given to him, though *he* never pleaded, ſeems yet undetermined." 2 vol. 317.

Thomas Reilly's Caſe.

CASE 169.

A convict on the 31 Geo. 2. c. 10. for taking a falſe oath, &c. who is pardoned before judgment, is a competent witneſs againſt the perſon who ſuborned him to take ſuch oath; for by the allowance of the pardon he is reſtored to his former competency and credit.

THE ſtatute 31 Geo. 2. c. 10. ſ. 24. enacts, "That whoſoever ſhall willingly and knowingly take *a falſe oath*, or procure any other perſon to take a falſe oath, to obtain the probate of any will or wills, or to obtain letters of adminiſtration in order to receive the payment of any wages, pay, or other allowances of money, or prize-money, due, or that were ſuppoſed to be due, to any officer, ſeaman, or other perſon intitled, or ſuppoſed to be intitled, to any wages, pay, or other allowances of money, or prize-money, for ſervices done on board any King's ſhip or veſſel, who has really ſerved, or was ſuppoſed to have ſerved, on board any King's ſhip or veſſel, every ſuch perſon ſo offending ſhall be deemed guilty of *felony*, and ſhall ſuffer death as a felon, without benefit of clergy."

At the Old Bailey, in July Seſſion 1787, *John Macdaniel* was convicted on this ſtatute before *James Adair*, Eſq; Recorder, for taking *a falſe oath*, "That one *James Lewis*, a Seaman on "board his Majeſty's ſhip the *Hannibal*, died a "batchelor, inteſtate, and without a parent, and "that he, *John Macdaniel*, was his lawful brother, and next of kin," with intent to obtain letters of adminiſtration to the goods and chattels of the ſaid *James Lewis*, &c. In the courſe of the trial it was diſcovered that a perſon of the name of *Thomas Reilly*, who appeared as a witneſs, had taken advantage of the priſoner's ignorance, and had ſuborned him to commit the offence. *Thomas Reilly* was accordingly committed

to

to take his trial at the next Seſſion, and no judgment was paſſed upon the priſoner, *John Macdaniel*. REILY'S CASE.

In the September Seſſion following, on the trial of the indictment againſt *Reily*, for procuring *John Macdaniel* to take the ſaid falſe oath, *John Macdaniel* was produced as a witneſs on the part of the Crown. The Counſel for the priſoner (*a*) produced the record of his conviction in the July Seſſion preceding, and ſubmitted to the Court, that his competency was thereby deſtroyed, notwithſtanding the conviction had not been yet followed by a judgment; but the Counſel for the Crown (*b*) waived the argument upon this point; and on *Macdaniel*'s being called upon to ſay why the Court ſhould not give him judgment to die, according to law, he pleaded his Majeſty's pardon in bar, and it was regularly allowed.

(*a*) Mr. Shepherd, Mr. Garrow.

(*b*) Mr. Silveſter, Mr. Fielding.

The queſtion therefore was, Whether a ſpecial pardon granted after a conviction on *this ſtatute*, but pleaded and allowed in bar of the judgment, reſtored the witneſs to his competency? or, Whether it only remitted him from the puniſhment to which he would have been liable in conſequence of an attainder?

In favour of the priſoner it was contended, that as a pardon, by the particular manner in which it is penned, merely imports an intention on the part of the King to diſcharge the party from future puniſhment, it was to be conſidered as *a charter of remiſſion* only; and could not, by conſequence and deduction, be conſidered as *a charter of reſtoration*, ſo as to remove the diſability to which the witneſs has once been rendered liable,

REILLY'S CASE. liable, and enable him thereby to prejudice the intereſts of third perſons, by giving evidence againſt them.

2 Hale, 278. On the part of the Crown it was contended, that the King's pardon not only remits the puniſhment, but reſtores the convict to his *plenam et liberam legem.*

The Court were clearly of opinion, That in caſes of felony a pardon from the Crown reſtores the competency of the convict; and that the verdict againſt *Macdaniel* was to be conſidered as a conviction of a *felony* committed through the medium of perjury, and not as a conviction of *perjury* itſelf. The teſtimony of *Macdaniel* was accordingly received in evidence, and the Jury acquitted *Abraham Davis*, and found *Thomas Reilly* guilty of the *offence* with which he ſtood charged in the indictment. But the judgment was reſpited, and the caſe ſubmitted to the conſideration of the twelve Judges.

Mr. Juſtice *Wilſon* in June 1788, after ſtating the particulars of the caſe as above recited, delivered the opinion of the Judges to the following effect.—The learned Judge who tried this indictment entertained ſome doubt reſpecting the competency of *Macdaniel*'s teſtimony. The caſe was accordingly reſerved for the conſideration of the Judges; and they are of opinion, That if *Macdaniel* had not received his Majeſty's pardon, ſome doubt might have been entertained; but as he was pardoned, and that pardon regularly allowed, they are clear that it not only reſpites the convict from puniſhment, but entirely abſolves him from the crime, and reſtores him compleatly to

to his former competency and credit. The caſe of *Cuddington v. Wilkins*, in Ld. Ch. Juſtice Hobart's Reports, is preciſely in point, and deciſive of the queſtion; for it is there expreſly determined, that the King's pardon doth not only clear the offence itſelf, but all the dependencies, penalties, and *diſabilities* incident to it. The Judges therefore are of opinion, That the teſtimony of *Macdaniel* was properly admitted in evidence; and that *Thomas Reilly*, the priſoner at the bar, has been legally convicted on this indictment.

REILLY'S CASE.

Hob. 67, 82.

The priſoner received ſentence of death.

Henrietta Radbourne's Caſe.

CASE 170.

AT the Old Bailey, in July Seſſion 1787, *Henrietta Radbourne* was tried before Mr. Juſtice *Wilſon*, preſent *James Adair*, Eſq; Recorder, on an indictment conſiſting of one count only; which charged, that ſhe "feloniouſly, "*traitorouſly*, wilfully, and of her malice afore-"thought, did kill and murder one *Hannah* "*Morgan*, her miſtreſs." She alſo ſtood charged upon the Coroner's Inquiſition for petty treaſon and murder.

A perſon indicted of petty treaſon and murder, combined in one count, may be found guilty of the murder, and acquitted of the treaſon; and an information before a Juſtice, made by the deceaſed on oath, may be given in evidence on the trial, tho' the informant was not apprehenſive of death, and tho' the information be ſigned by one witneſs only.

The deceaſed ſurvived for ſeveral weeks the blows and wounds which were the cauſe of her death. During this interval, and before ſhe was

apprehenſive

RADBOURNE'S CASE.

apprehenſive of, or, from the evidence of the ſurgeon who attended her, had any reaſon to apprehend her approaching diſſolution, ſhe gave an information upon oath, before a Juſtice of the Peace, which was read deliberately over to her in the preſence and hearing of the priſoner, then ſigned by her, and authenticated by the magiſtrate; and he was the only ſubſcribing witneſs to it. This information, being regularly proved, was admitted in evidence againſt the priſoner (*a*); but the fact having been committed at the dead of night, there was no *poſitive* evidence, either by the contents of this information, or by the ſeveral witneſſes who were examined *vivâ voce*, that the priſoner was guilty.

(*a*) See the caſe of *W. Woodcock* for murder, O. B. Dec. Seſſ. 1788, where an information before a Juſtice of the Peace, given by the deceaſed, after ſhe had received the mortal wound, was admitted to be read againſt the priſoner by Ld Ch. Baron *Eyre*, tho' it did not appear that ſhe was apprehenſive of her impending death, *poſt*.

The evidence, however, though entirely *circumſtantial*, was extremely ſtrong; but as there was not any ſet of circumſtances proved by two witneſſes, the learned Judge thought the priſoner could not be legally convicted of the charge of petty treaſon, the law requiring two witneſſes to convict a perſon of that offence.

The Jury found the priſoner *guilty*, both on the indictment and inquiſition, of the murder only. The verdict was entered upon the record, "*Jury* "*ſay Guilty of the wilful murder, but Not Guilty* "of the treaſon."

The judgment was reſpited upon this conviction, and two queſtions were ſubmitted to the conſideration of the twelve Judges.—*Firſt*, Whether a priſoner can be convicted of murder upon an indictment or inquiſition for petty treaſon? That is, Whether the acquittal for the petty treaſon does not involve in it an acquittal of the murder

der alſo?—*Secondly*, Whether the information of *Hannah Morgan*, the deceaſed, authenticated by one witneſs only, was legally received in evidence? RADBOURNE'S CASE.

Mr. *Recorder*, on the firſt day of the December Seſſion following, reported, that it was the unanimous opinion of eleven Judges, Lord *Manſfield* being abſent, that the learned Judge did right in admitting the information of *Hannah Margan* to be received in evidence, and that the priſoner was legally convicted of *murder* on the indictment and inquiſition for *petit treaſon*.

The priſoner accordingly received ſentence, and was executed.

Juſtin Harvey's Caſe. CASE 171.

AT Chelmsford Summer Aſſize 1787, for the County of Eſſex, *Juſtin Harvey* was indicted before Mr. Juſtice *Gould* for horſe-ſtealing.

If a horſe be purchaſed, and delivered to the buyer, it is not felony, tho' he *immediately* ride away with it, without paying the purchaſe-money.

The proſecutor had ſent his ſervant with the horſe to Harlowbuſh Fair, in order to ſell it. The priſoner met the proſecutor, to whom he was perſonally known, in the fair. "I hear," ſays the priſoner, "you have a horſe to ſell. I think "he will ſuit my purpoſe; and if you will let "me have him a bargain, I will buy him." The priſoner and the proſecutor walked together into the fair; and upon a view of the horſe, the proſe-

HARVEY'S CASE.

prosecutor said to the prisoner, "You shall have "the horse for Eight Guineas;" and calling to his servant, he ordered him to deliver the horse to the prisoner. The prisoner immediately mounted the horse, saying to the prosecutor, that he would return immediately and pay him. The prosecutor replied, "Very well, very well." The prisoner rode away with the horse, and never returned.

The Court. It is impossible by any construction whatsoever to make this case a felony. The case in *Kelynge*'s Reports, 82. where a man rides away with a horse, which he had obtained on pretence of trying its paces, was a conditional delivery. *Major Semple*'s *case* (*a*), which is the most recent of the kind, and included a consideration of *the King v. Pares* (*b*), was a delivery for a special purpose, or rather a contract of unlimited duration. But in the present case the delivery was unconditional, and the contract was compleated. It was a sale; and the *possession* as well as the *property* was entirely parted with. The prisoner has defrauded the prosecutor of *the price* of the horse, but not of the horse itself; and his only remedy is by action to recover the Eight Guineas: but the prisoner cannot be indicted for a felony.

(*a*) Ante, 355.

(*b*) Ante, 213.

William

William Morris' Caſe.

CASE 172.

SERJEANTS INN HALL, MICHAELMAS TERM, 18 GEO. 3.

AT the Old Bailey, in July Seſſion 1787, *George Horne* was indicted on the ſtatutes of 12 Anne, c. 7. and 2 Geo. 2. c. 25. for ſtealing two Bank Notes in the dwelling-houſe of *Stephen Sullivan*, Eſq; the *property* of the ſaid *Stephen Sullivan;* and *William Morris* ſtood charged in the ſame indictment on the ſtatutes of 3. Will. and Mary, c. 9. ſ. 4. and 5 Anne, c. 31. ſ. 5. for receiving the ſaid Notes, the *property and chattels* of the ſaid *Stephen Sullivan*, he the ſaid *William Morris* well knowing the ſaid *notes and chattels* to have been feloniouſly ſtolen. There was another count charging *William Morris* as an acceſſary after the fact at common law, with harbouring and maintaining the principal felon.

The word *chattles*, improperly inſerted in a count againſt an acceſſary, may be rejected as ſurpluſage. It is not felony to receive *bank-notes*, knowing them to have been ſtolen.

The priſoners were found *Guilty* on all the counts, (except that which charged *Morris* as an acceſſary at common law) on very clear and ſatisfactory evidence; but the Counſel (*a*) for *William Morris* ſubmitting two objections in his favour to the Court, they were extremely well argued both for the priſoner and for the Crown; and the Court reſerved the caſe for the opinion of the twelve Judges.

(*a*) Mr. Knowlys.

On the 14th November following all the Judges, except Lord *Mansfield* and Lord Chief Baron *Eyre*, aſſembled at Serjeants Inn Hall, and the caſe was again argued by Mr. *Knowlys* on behalf of the priſoner (*b*).

(*b*) N. B. Mr. Garrow was alſo tohave argued in favour of the priſoner, but the Judges determined to hear one Counſel only.

Firſt

MORRIS' CASE.

First Objection. There is a fatal variance in the indictment, between the count againſt the principal, and the count againſt the acceſſary. The firſt charges the things ſtolen to be the *property* of *Stephen Sullivan*, and the ſecond charges them to be the *notes*, *property*, and *chattels* of *Stephen Sullivan*. There cannot be an acceſſary for receiving ſtolen goods, unleſs the goods ſtolen are of ſuch a kind as are legally included within the meaning of the words "*goods and chattels* (*a*);" for no other kind of goods can be the ſubject of larceny. The word *property* is not ſynonimous with *goods or chattels*; for a man may have a property in many things which, in reſpect of the vileneſs of their nature, are not the ſubject of theft, as maſtiffs, blood-hounds, cats, monkeys, &c. (*b*). So alſo, if they reſpect the realty, as a box in which charters are contained, although the box may be of great value, and if ſtolen, without the charters in it, would have been the ſubject of an indictment of larceny. The framer of the indictment therefore having confined the ſubject of it by a certain *deſcription*, it ſhall not be now permitted to define the thing ſtolen more ſtrictly in the charge againſt the acceſſary than they have done in the charge againſt the acceſſary than they have done in the charge againſt the principal: Being called *property* as to the *principal*, it cannot be conſtrued *chattels* as to the *acceſſary*.

(*a*) 3 Will. and Mary, c. 9. 5 Anne, c. 31. Cro. Eliz. 490.

(*b*) 3 Inſt. 109.

Second Objection. The receiving of Bank-Notes, knowing them to have been ſtolen, is not felony, either by the common law, or by the ſtatutes on which the charge againſt the acceſſary is founded. The receiving of ſtolen goods was at common law a miſdemeanor only; and a man could

could not be guilty as an acceſſary after the fact, except by receiving the felon himſelf. But it is enacted by the ſtatutes of the 3 Will. and Mary, c. 9. ſ. 4 and 5 Anne, c. 31. ſ. 5. "That whoever ſhall buy or receive any Goods or Chattels that ſhall be feloniouſly taken or ſtolen from any other perſon, knowing the ſame to be ſtolen, ſhall be taken and deemed an acceſſary to ſuch felony after the fact, and ſhall incur the ſame puniſhment as an acceſſary to the felony after the felony committed." The queſtion therefore is, Whether Bank-Notes can be conſidered as Goods and Chattels within the meaning of theſe ſtatutes? Bank-Notes were not, at common law, the ſubject of larceny; for although that offence is defined to be the felonious taking and carrying away the Goods and Chattels of another (*a*), yet it has always been confined to the mere perſonal Goods and Chattels of another, which do not extend to every ſpecies of perſonal property of which a man may become poſſeſſed. The words *bona et catalla* do not of their proper nature extend to charters, or to any evidences concerning the freehold or inheritance, or to obligations, or to deeds, or to other ſpecialties (*b*); and therefore it is ſaid by Lord *Dyer*, that an action of trover will not lie for a bond, nor can the value of it be demanded by the name of Goods and Chattels (*c*). Among this ſpecies of property, which were not the ſubjects of larceny, becauſe they were not comprehended within the legal idea of Goods and Chattels (*d*), were Bank-Notes, and every other deſcription of property which is within the denomination of a *Choſe in Action*. But it is enacted by the ſtatute 2 Geo. 2. c. 25. ſ. 3. "That if any perſon or perſons ſhall ſteal or take by robbery any Exchequer

Morris' Case.

(*a*) Calvert's caſe, 8 Co. 33. a. and b.

(*b*) Yel. 68.

(*c*) Dyer, 5.

(*d*) Style, 468. 8 Co. Rep. 33. Yelv. 4.

MORRIS' CASE.

" chequer Orders, Exchequer Bills, Bank-Notes, " Bonds, Bills of Exchange, &c. notwithſtand- " ing any of the ſaid particulars are termed in " law a *Choſe in Action*, he ſhall be deemed guilty " of felony, of the ſame nature, and in the ſame " degree, as it would have been if the offender " had ſtolen any *other goods* of the like value with " the money due on ſuch orders, bills, bonds, " notes, &c. or ſecured thereby." This ſtatute undoubtedly makes Bank-Notes ſo far Goods and Chattels, as to make them the ſubject of larceny, but no further; it does not ſay that the receivers of ſtolen Bank-Notes ſhall be conſidered as acceſſaries after the fact, or that Bank-Notes ſhall be conſidered as Goods and Chattels to all intents and purpoſes whatſoever. As to the proviſion, that ſuch perſons who ſhall ſteal them ſhall be puniſhed " in the ſame manner as if they " had ſtolen *other goods* of the like value," the word " *goods*," in this part of the Act, is not uſed in the ſtrict, legal, and technical ſenſe of the term, but is only put as an inſtance, and uſed in the general and colloquial acceptation of the word, as ſynonimous to " *property*" in general. If any doubt could be entertained on this ſubject, the opinion of Lord *Mansfield* in the caſe of *Miller v. Race* (*a*), long ſubſequent to the paſſing of the Act, would certainly remove it; for his Lordſhip expreſly declares, that Bank-Notes do not reſemble, and therefore ought not to be compared, to *goods*, ſecurities, documents, and other chattels; but are to be treated as money, or caſh; and it has been uniformly held, that money cannot be included within the meaning of the words " Goods and Chattels." In (*b*) *Davidſon's caſe*, at Carliſle Aſſizes 1766, a man

(*a*) Hil. 31 Geo. 2. 1 Burr. 457.

(*b*) Ante, 48, 435.

man was indicted for receiving money, knowing it to have been ſtolen; and Mr. Juſtice *Bathurſt* was clearly of opinion, that money was not within the ſtatutes 3 Will. and Mary, c. 9. or 5 Anne, c. 31. In the caſe of *Woolcomb v. Woolcomb*, it was held by Lord Chancellor King, that the ready money and bonds of a teſtator do not paſs by the word "*goods.*" Mr. Juſtice *Foſter* alſo ſays, that *money* is not within the 10 and 11 Will. 3. c. 23. which makes it a capital offence to ſteal any *goods*, *wares*, and *merchandizes*, to the value of five ſhillings, from a ſhop or warehouſe. But even admitting that Bank-Notes were now taken to be Goods and Chattels by virtue of the 2 Geo. 2. c. 25. to all intents and purpoſes whatſoever, yet it would be impoſſible to include the receivers of them under the 3 Will. and Mary, c. 9. and 5 Anne, c. 31. becauſe "*Bank-Notes*" could not be at that time in the contemplation of the Legiſlature as goods and chattels. All bonds, bills, notes, and other ſecurities were then *Choſes in Action*, and could not be included, by any conſtruction, within the meaning of the words "*Goods and Chattels;*" for thoſe words can only refer to the receipt of ſuch things as were Goods and Chattels at the time the Acts were paſſed. The ſtatute of the 31 Eliz. c. 12. takes away clergy from acceſſaries after the fact in horſe-ſtealing; but it has been held that the ſtatute only extends to ſuch offenders as were acceſſaries at the time the Act was made, *viz.* acceſſaries at the common law; and therefore a man knowingly receiving a ſtolen horſe, if he did not alſo receive the felon, was not within the Act. It is true, that ſuch an offender may now be puniſhed as a receiver of ſtolen goods under the 5 Anne, c. 31.

MORRIS' CASE.

3 P. Will. 112.

Foſter, 79.

Foſter, 373.

After

MORRIS' CASE.

After the argument was closed, the auditors were ordered to withdraw, and the Judges conferred among themselves upon the subject.

Mr. Baron *Perryn*, in January Session 1788, after stating the particulars of the case, delivered the result of their conference to the following effect:—This case was reserved in July Session last by Mr. *Rose*, and referred to the consideration of the Judges on two grounds. First, On a variance between the count against the principal, wherein the notes are charged to be the *property* of *Stephen Sullivan*, and the count against the accessary, wherein they are charged to be the *property and chattels* of *Stephen Sullivan*. Secondly, That the receiving of Bank-Notes is not within any Act of Parliament which makes receivers accessaries after the fact. On the first day of last Michaelmas Term, the Judges, on a conference had by them, directed Counsel to be heard on these objections; and on the 14th of November the case was argued before ten Judges with great ability, and very much at large, by Mr. *Knowlys*. The Judges have since considered of those arguments; and with respect to the first objection, they are unanimously of opinion, that the word "*Chattels*," in the count against the accessary, may be rejected as surplusage. The subject of the second objection has occasioned a difference of sentiment among the Judges; but a majority of them are of opinion, in which opinion I concur, that *Calye*'s *Case*, 8 *Co.* 33. *Channel v. Ramsbottom*, *Telv.* 68. and particularly *Millar v. Race*, 1 *Bur.* 457. are in point; and that "*Bank-Notes*" are not "*Goods and Chattels*" within the meaning of the statutes of the 3 Will. and Mary, c. 9. and 5 Anne, c. 31. and that the

the judgment againſt *William Morris*, the priſoner at the bar, muſt conſequently be arreſted. MORRIS' CASE.

The priſoner was accordingly diſcharged.

Dean's Caſe.

CASE 173.

THE priſoner was indicted at the Old Bailey, in September Seſſion 1787, for *putting off* counterfeit money, contrary to the proviſions of 8 and 9 Will. 3. c. 26. ſ. 6. by the name of *Thomas Dean*.

In what manner a *miſnomer* may be pleaded and tried; and a convict deprived of his clergy by means of a *counter-plea*.

On being put to the bar to be arraigned, he pleaded by Counſel *ore tenus*, that his name was *John* and not *Thomas Dean*. The Clerk of the Arraigns on behalf of the Crown replied, that he was as well known by the name of *Thomas* as by the name of *John Dean*; and upon this replication the iſſue was joined.

The Sheriff returned a Jury *inſtanter* to try this iſſue, and it was found for the Crown; upon which the priſoner pleaded over to the felony, Not Guilty.

He was immediately arraigned upon the indictment, and put upon his trial; and the Jury found him Guilty.

On being aſked by the Clerk of the Arraigns, what he had to ſay why judgment of death ſhould not be paſſed upon him according to law, he pray-

DEAN'S CASE.

ed to be allowed the benefit of clergy. Againſt this *plea*, the Counſel for the proſecution filed a *counter-plea*, which alledged that the priſoner was not entitled to the benefit of the ſtatute, becauſe it had been before allowed to him.

The Court gave the priſoner time till the enſuing Seſſion to frame a replication to this counter-plea; but he died in Newgate in the intermediate time.

CASE 174.

Andrew Redman's Caſe.

A bad indictment may be made good by rejecting, as inſenſible and uſeleſs, ſuch words as obſtruct the ſenſe of it.

AT the Old Bailey, in September Seſſion 1787, before Mr. Juſtice *Groſe*, *John Cooper* was indicted for grand larceny; AND *Thomas Upton*, *Farrel Kernan*, and *Andrew Redman*, were charged in the ſame indictment, on the ſtatutes of 3 Will. and Mary, c. 9. ſ. 4. and 5 Ann. c. 31. ſ. 5. as acceſſaries after the fact.

The charge in the indictment againſt *Andrew Redman* was in theſe words: "And the Jurors, "&c. do further preſent, that *Andrew Redman*, "late of the pariſh of, &c. ſix cotton ſhirts, of "the value of twenty-five ſhillings, being other "part and parcel of the goods and chattels ſo "aforeſaid feloniouſly ſtolen, taken, and carried "away, feloniouſly did receive and have (he the "ſaid *Andrew Redman* then and there well knowing the ſaid goods and chattels *to have feloniouſly ſtolen*, taken, and carried away) againſt the "form of the ſtatute," &c.

The

REDMAN'S CASE.

The words of the ſtatutes are, "That if any "perſon or perſon ſhall buy or receive any goods "or chattels that ſhall be felonioufly taken or "ſtolen from any other perſon, knowing the "ſame *to be ſtolen*, he or they ſhall be taken or "deemed an acceſſary or acceſſaries to ſuch felony "after the fact," &c.

It was objected, before Mr. Serjeant *Adair*, Recorder, in arreſt of judgment, that in that part of the indictment which ſhould have imputed to the acceſſary a knowledge of the felony before committed, the framers of it had uſed the *preſent tenſe* of the infinitive mood of the active auxiliary TO HAVE, *viz.* "to have felonioufly ſtolen," inſtead of the *paſt time* paſſive of the neuter verb TO BE, *viz.* "to have been felonioufly ſtolen."

The Recorder upon this objection reſpited the judgment, and ſubmitted the caſe to the opinion of the twelve Judges.

In October Seſſion 1787, the priſoner was put to the bar, and informed by Mr. Juſtice *Heath*, that upon mature conſideration the Judges were of opinion, That the indictment might be ſupported by rejecting as *inſenſible* the words which obſtruct the ſenſe, *viz.* the words, "to have;" and then the indictment would run thus, "the "ſaid *Andrew Redman*, then and there well know-"ing the ſaid goods and chattels felonioufly ſto-"len, taken, and carried away."

The priſoner upon this determination received ſentence to be tranſported for the term of fourteen

FREEMAN'S CASE.

years (a) to commence from the time of his conviction.

(a) See 4 Geo. I. c. 11.

CASE 175.

Durham and Crowder's Caſe.

The practice of not calling upon a priſoner to defend himſelf againſt the ſingle uncorroborated teſtimony of an accomplice is rather a matter of diſcretion with the Court, than a general rule of law; and a priſoner may be convicted on ſuch teſtimony, if the Jury can in their conſciences believe ſo diſcredited a witneſs.

OLD-BAILEY, December Seſſion 1787, the priſoners were tried before Mr. Baron *Perryn* for burglary in the dwelling-houſe of *Hannah More*, and ſtealing therein a great quantity of wearing apparel.

The only evidence which affected the priſoners aroſe from the teſtimony of one *Francis Fleming*, a pawn-broker, who had been in the habit of receiving ſtolen goods for a ſeries of years, but who had impeached a great number of the principal offenders, and had been bound over by the Juſtices of the Peace to give evidence againſt them, as a witneſs for the Crown.

The priſoner's Counſel, by an examination of *Fleming* on the *voir dire*, endeavoured to prove him an accomplice in the burglary, in order to form an objection againſt the competency of his evidence; on the ground that no previous teſtimony of the priſoners guilt had been given, and that under ſuch circumſtances the uncorroborated teſtimony of an accomplice could not be received.

But the Court ſaid, that *Fleming* was to be conſidered rather as an acceſſary after the fact than as an accomplice in the fact; but even admitting that he had been an accomplice, the objection would only go to his credit, and not to his competency.

petency. This matter was determined by all the Judges on the firſt day of the preſent Michaelmas Term. Mr. Juſtice *Buller* had tried a priſoner for felony, and he was convicted on the evidence of the accomplice only: he referred the caſe to the twelve Judges; and the ten Judges who were preſent were unanimouſly of opinion, That the circumſtance of his being an accomplice went to his credit only, and that his evidence might be left with the Jury, although it was entirely uncorroborated by any other teſtimony; and that the practice of rejecting an unſupported accomplice, is rather a matter of diſcretion with the Court, than a rule of law. DURHAM & CROWDER'S CASE.

The Court accordingly told the Jury, that the caſe depended entirely on the evidence of *Fleming*; and after ſome deliberation, they found the priſoners guilty.

This matter was afterwards mentioned to the Judges, and the priſoners at the end of the Seſſion received ſentence of death.

The

CASE 176.

The King *against* Wyer.

IN THE KING'S BENCH, MICHAELMAS TERM 1787.

A priſoner committed for knowingly receiving part of the cargo of a ſhip in the Thames, is not entitled to be bailed; for the offence is felony, tho' it is not expreſſed to be ſo in the ſtatute 2 Geo. 3. c. 28.

THE defendant was brought before the Court under a writ of *Habeas Corpus*, and prayed that he might be admitted to bail. On reading the return it appeared that he had been committed on a charge of receiving part of the cargo belonging to a veſſel in the river *Thames*, he well knowing the ſame to be ſtolen.

It is enacted by the ſtatute 2 Geo. 3. c. 28. ſ. 12. "That every perſon who ſhall buy or receive any "part of the cargo or loading of, or any goods, "ſtores, or things of or belonging to any ſhip "or veſſel in the river *Thames*, knowing the ſame "to be ſtolen or unlawfully come by, or ſhall "privately buy or receive any ſuch goods, ſtores, "or things, &c. ſhall, being thereof convicted "by due courſe of law, (although the principal "felon or felons has or have not been convicted "of ſtealing the ſame) be tranſported for four-"teen years, according to the laws in force for "the tranſportation of felons."

(a) By Mr. Fielding, Mr. Garrow.

It was contended in favour of the priſoner (a), that the offence deſcribed by the ſtatute was a miſdemeanour only, and not a felony; for that as the legiſlature had not expreſsly enacted that it ſhould be a felony, it could not be ſo made by conſtruction and implication; and that the concluding words of the clauſe were merely explanatory of the time and manner of puniſhment, and not deſcriptive of the kind of offence.

On

WYER'S CASE.

On the part of the profecution it was contended *(a)*, that the offence for which the priſoner was committed was felony, and therefore the Court would not admit him to bail. By the 3 and 4 Will. and Mary, c. 9. ſ. 4. receivers of ſtolen goods may be profecuted as felons; and by 1 Ann. ſt. 2. c. 9. ſ. 2. may be puniſhed as for a miſdemeanour, where the principal felon is not convicted. The ſtatute therefore under which the priſoner ſtands committed, muſt be conſidered *in pari materiâ;* and although the 12th ſection does not in expreſs words declare, that ſuch offenders ſhall be felons, yet it is evident they were intended by the Legiſlature to be ſo conſidered; for by ſection 14. any perſon ſtealing or unlawfully receiving ſtolen goods, knowing the ſame to be ſtolen, ſhall, on diſcovering two other offenders, be intitled to a pardon for all *ſuch felonies*.

(a) By Mr. Shepherd.

The Court being of opinion that the offence was FELONY, the priſoner was remanded.

William Howe's Caſe.

CASE 177.

AT the Old Bailey, in January Seſſion 1788, *William Howe* was convicted before Mr. Juſtice *Wilſon*, preſent L. C. B. *Eyre*, on the ſtatute 6 Geo. 3. c. 36. for ſpoiling and deſtroying in the night-time, five SHRUBS called *ſweet bay-trees*, of the value of five ſhillings, growing in an incloſed ground belonging to *Robert Palethorp*.

In what manner the ſtatutes for the preſervation of ſhrubs, roots, plants, &c. ſhall be expounded.

A doubt

HOWE'S CASE. A doubt aroſe, Whether the ſtatute of 6 Geo. 3. c. 36. which makes the offence felony, puniſhable with tranſportation for ſeven years, was not virtually repealed by the ſtatute of 6 Geo. 3. c. 48. which makes the offender liable to pecuniary penalties only, on his firſt and ſecond conviction. Upon this doubt the judgment was reſpited, and the caſe referred to the conſideration of the twelve Judges.

The ſtatute of 6 Geo. 3. c. 36. enacts, "That "all and every perſon and perſons who ſhall in "the *night-time* pluck up, break, ſpoil, or deſtroy, "or carry away, any root, ſhrub, or plant, roots, "ſhrubs, or plants, of the value of *five ſhillings*, "and which ſhall be growing, ſtanding, or being, "in the garden-ground, nurſery-ground, or other "incloſed ground, of any perſon or perſons whomſoever, ſhall be deemed and conſtrued to be "guilty of FELONY, and the Court have authority to tranſport ſuch offenders for ſeven years."

The ſtatute of 6 Geo. 3. c. 48. ſ. 3. enacts, "That all and every perſon who ſhall pluck up, "or cut, ſpoil, or deſtroy, or take or carry away, "any root, ſhrub, or plant, roots, ſhrubs, or "plants, out of the fields, nurſeries, gardens, "or garden-grounds, or other cultivated lands, "of any perſon or perſons whomſoever, without "the conſent of the owner or owners thereof firſt "had and obtained, and ſhall be thereof convicted on the oath of one or more witneſs or witneſſes, before one or more Juſtice or Juſtices "of the Peace for the county or place where the "offence ſhall have been committed, ſhall for "the *firſt offence* forfeit any ſum not exceeding

"*forty*

" *forty ſhillings*, &c. together with the charges " previous to and attending ſuch conviction.— " AND if any perſons ſo convicted ſhall again " commit the like offence, and ſhall be thereof " convicted in manner aforeſaid, ſuch perſon and " perſons ſhall forfeit for ſuch *ſecond offence* any " ſum not exceeding *five pounds*, &c. together " with the coſts and charges, &c.—AND if any " perſon ſo before convicted, ſhall a *third time* " commit the like offence, and ſhall be thereof " convicted, ſuch perſon for ſuch third offence " ſhal be deemed *guilty of felony;* and the Court " hath authority to tranſport ſuch perſon for the " ſpace of ſeven years." HOWE'S CASE.

Mr. Baron *Thompſon*, in the February Seſſion following, delivered the opinion of the Judges. —At a meeting of the Judges, from which only one was abſent, this caſe was taken into conſideration; and they are unanimouſly of opinion, That the ſtatute of 6 Geo. 3. c. 36. upon which the indictment is founded, is not repealed by the ſtatute of 6 Geo. 3. c. 48. ſ. 3. The firſt ſtatute applies only to the offence of ſtealing or deſtroying ſhrubs of the value of five ſhillings, in the *night-time*, and does not at all extend to the ſtealing or deſtroying ſhrubs in the *day-time*, be their value to what amount it may. The ſecond ſtatute was paſſed during the ſame ſeſſion of Parliament as the firſt ſtatute, and it recites the practice which prevailed of ſtealing and deſtroying roots, ſhrubs, and plants, many of which, ſays the preamble, are of great value; and to protect this ſpecies of property both by *day* and *night*, this Act was made. —Theſe ſtatutes, therefore, are to be conſidered in *pari materiâ*, as compoſing one ſyſtem of law, and when taken together their proviſions will ſtand

HOWE'S CASE.

ſtand thus:—If the property taken or deſtroyed be of the value of five ſhillings, and the offence be committed in the *night-time*, the offender may be proſecuted for the felony, under the 6 Geo. 3. c. 36.—If the property be under the value of five ſhillings, and taken or deſtroyed *by night* or *by day*; or being above the value of five ſhillings, and under forty ſhillings, is taken or deſtroyed in the *day-time*; the offender can only be puniſhed by the penalties inflicted by 6 Geo. 3. c. 48. ſ. 3.—The Judges therefore are all of opinion, That the priſoner was properly convicted upon the firſt mentioned ſtatute.

The priſoner was fined One Shilling, and impriſoned ſix months.

The King *againſt* Judd.

CASE 178. IN THE KING'S BENCH, HILARY TERM 1788.

In a commitment for felony it is not neceſſary to alledge that the offence was *feloniouſly* done; it is ſufficient if enough appears for the Court to collect whether the charge be felony or not, and they will accordingly *bail* or *remand* the priſoner.—Setting fire to a parcel of unthreſhed wheat, is not felony within 9 Geo. 1. c. 22.

HENRY JUDD was committed to *Hertford* gaol, by a warrant under the hands and ſeals of eleven Juſtices of that county, on the oath of *George Sworder* and others, charging him, "with "giving two guineas to one *Daniel Wright*, "(which *D. Wright* ſtands convicted of a burgla-"ry in the dwelling-houſe of the ſaid *George*

"*Sworder*)

" *Sworder)* to diſturb the dwelling-houſe of the " ſaid *George Sworder*. AND ALSO—with giv- " ing to *Nathaniel Rand*, about a fortnight after " harveſt laſt, a guinea and a half, to *keep on* " with the ſaid *George Sworder* as the ſaid *N.* " *Rand* had then begun, and to do him the ſaid " *George Sworder* all the miſchief he could, except " killing him.—AND for being acceſſary with the " ſaid *N. Rand*, who was committed to Hertford " gaol on the oaths of the ſaid *George Sworder* " and others, as well as upon his own confeſſion, " in wilfully and maliciouſly ſetting fire to a par- " cel of unthreſhed wheat, in the night, the pro- " perty of the ſaid *George Sworder;* and which " he the ſaid *N. Rand* hath confeſſed he did at " the requeſt of the ſaid *Henry Judd.*" JUDD'S CASE.

On Monday 4th February 1788, the priſoner was brought up to this Court from Hertford gaol by *Habeas Corpus* to be bailed; and his commitment being read, it was contended by Mr. *Silveſter* and Mr. *Fielding* for the priſoner, that the warrant contained no charge of felony, and therefore he was entitled to be bailed or diſcharged, by virtue of the ſtatute 31 Car. 2. c. 2.

Mr. *Erſkine*, Mr. *Mingay*, and Mr. *Garrow*, for the Crown, admitted that the firſt two charges in the warrant did not contain ſuch a deſcription of felony as would intitle them to expect that the priſoner ſhould be remanded; but that the third charge contained a full and ſufficient deſcription of an acceſſary *at common law* to the felony, created by the ſtatute 9 Geo. 1. c. 22. which enacts, " That if any perſon or perſons ſhall ſet fire to " any houſe, barn, or outhouſe, or to any hovel, " cock, mow, or ſtack of corn, ſtraw, hay, or " wood;

JUDD'S CASE.

" wood; or ſhall by gift, or promiſe of money " or other reward, procure any of his Majeſty's " ſubjects to join him or them in any ſuch unlaw- " ful act, every perſon ſo offending ſhall be guilty " of felony, without benefit of clergy."

The priſoner's Counſel replied, that acceſſaries at the common law, unleſs there was a ſtrong preſumption of their guilt, ariſing from an indictment having been found againſt them, were entitled to be bailed; that the warrant only charged the principal " with wilfully and maliciouſly ſet- " ting fire to a parcel of unthreſhed wheat," and no ſuch offence was made felony by the ſtatute; and admitting it was an offence within the meaning of the ſtatute, yet the warrant would be defective, in not charging it to have been done *feloniouſly*.

Mr. Juſtice *Aſhhurſt*.—However improper the defendant's conduct appears to have been upon the proceedings before the Juſtices, yet unleſs it appears upon the face of the commitment itſelf that the defendant is charged with a felony, we are bound by the *Habeas Corpus Act* to diſcharge him; taking ſuch bail for his appearance to take his trial as we in our diſcretion ſhall think fit, according to the circumſtances of the caſe: the queſtion therefore is, Whether there is ſpecified in this commitment ſuch an offence as amounts to felony? It is admitted that neither of the firſt two charges amount to felony. The laſt charge is, that the defendant was an acceſſary with *Rand* in *wilfully* and *maliciouſly* ſetting fire to a *parcel* of unthreſhed wheat, without alledging that the offence was done *feloniouſly*. and although it is not neceſſary that the word "*feloniouſly*" ſhould be uſed

uſed in the committment, yet it ought to appear on the facts ſtated to be in law a felony, and within the deſcription of the Act. Now the ſtatute has only made it felony to ſet fire to a *cock*, *mow*, or *ſtack of corn*, and the defendant is not charged with either of theſe. We muſt ſuppoſe, that the Legiſlature well knew the meaning of the words they have uſed; and if a Juſtice of the Peace uſes the ſame words, we are bound to ſuppoſe that he intended them in the ſame ſenſe; but if he makes uſe of other words, he muſt be more preciſe. Now, here, a *parcel* of unthreſhed wheat is too looſe a deſcription. It does not come within the deſcription of the Act. We cannot ſay how much is meant by the word *parcel*. Twenty ears of wheat may be called a *parcel;* but can never be conſtrued either a *cock*, *mow*, or *ſtack*. I am therefore of opinion, that as the warrant of commitment does not charge the defendant with a felony, we are bound to bail him. With regard to the *quantum* of the bail; although the nature of the defendant's crime is not very accurately ſtated, yet as ſufficient appears on the depoſitions returned with the commitment to ſhew that he has at leaſt been guilty of an enormous offence, I think we ought to take an ample ſecurity for his appearance, and that he himſelf ſhould be bound in 1cool. and four ſureties in 500l. each.

Judd's Case.

Mr. Juſtice *Groſe*.—It is not neceſſary that the act ſhould be charged in the warrant of commitment to be done *felonicè;* it would be ſufficient, if on the facts ſtated we could not but ſee that the act was felonioufly committed. If therefore a *parcel* of wheat *ex vi termini* deſcribed a *cock*, *mow*, or *ſtack* of corn, I ſhould be of opinion that

Mr. Juſtice Buller was indiſpoſed, and unable to attend the whole Term.

JUDD'S CASE.

that a felony was ſufficiently charged in this commitment, but I think that it does not; for if in the act of removing a ſtack of corn from a farmer's yard to his barn, a ſmall parcel dropped by accident, the ſetting fire to that parcel would not be an offence within the Act of Parliament. As to the ſureties which we in our diſcretion ſhould require, I am of opinion, that the ſecurity mentioned by my brother *Aſhhurſt* ought to be given, ſince we cannot but ſee that the defendant has been guilty of a moſt atrocious act.

The defendant was bailed accordingly.

The King *againſt* Maſon.

CASE 179. IN THE KING'S BENCH, TRINITY TERM 1788.

An indictment for a fraud in obtaining money under *falſe pretences*, muſt ſtate what the falſe pretences were by which the fraud was effected.

AT the Quarter Seſſions at *Worceſter*, Thomas Maſon was convicted on the ſtatute 30 Geo. 2. c. 24. and received ſentence of tranſportation for ſeven years. The indictment conſiſted of two counts. The Firſt charged that *Thomas Maſon*, on the 13th June 1777, "unlawfully, knowingly, and deſignedly did obtain from one *Robert Schofield* divers ſums of money; that is to ſay, the ſum of Two Guineas, of the value of Two Pounds Two Shillings, of the lawful money of *Great Britain*, of the proper

" proper monies of the ſaid *Robert Schofield*, by " falſe pretences, with an intent then and there " to cheat and defraud the ſaid *Robert Schofield* " of the ſame." The Second charged, that the ſaid *Thomas Maſon*, on the 21ſt July 1777, " unlawfully, knowingly, and deſignedly did " obtain from the ſaid *Robert Schofield* the ſum " of Four Pounds Fourteen Shillings and Six- " pence, of lawful money of *Great Britain*, of " the proper monies of the ſaid *Robert Schofield*, " with intent then and there to defraud the ſaid " *Robert Schofield* of the ſame, to the great da- " mage, &c." and ſo concluding, " againſt the " form of the ſtatute in ſuch caſe made and " provided." MASON'S CASE.

This indictment was removed by Writ of Error into the Court of King's Bench; and two errors were aſſigned. Firſt, That it does not appear in the firſt count what the particular and ſpecific *falſe pretences* were by which *Thomas Maſon* obtained the money of *Robert Schofield*. Secondly, That the ſecond count does not ſtate by what particular means or pretences, or on what particular account the ſaid *Thomas Maſon* obtained the 4l. 14s. 6d. with intent to defraud *Robert Schofield*.

Mr. *Marryatt*, *for the defendant*.—To the firſt count theſe three objections may be made. Firſt, The offence imputed to the defendant is not ſpecified with ſufficient particularity. Secondly, The charge is repugnant. Thirdly, It does not conclude either againſt the peace, or againſt the form of the ſtatute. 1ſt day of June, 1788.

Firſt,

MASON'S CASE.

First, The offence is not ſpecified with ſufficient particularity. Without having recourſe to Lord *Coke*'s definition of the kind of certainty which is required in law proceedings, it is ſufficient to refer to the rule which Lord Chief Juſtice *De Grey* laid down in Mr. *Horne*'s *caſe (a)*, "That the charge muſt contain ſuch a deſcription of the crime that the defendant may know what crime it is which he is called upon to anſwer, that the Jury may appear to be warranted in their concluſion of *Guilty* or *Not Guilty* upon the premiſes delivered to them; and that the Court may ſee ſuch a definite crime that they may apply the puniſhment which the law preſcribes." "This," continues his Lordſhip, "I take to be what is meant by the different degrees of certainty mentioned in the books (*b*); and it conſiſts of two parts, the matter to be charged, and the manner of charging it. "As to the matter to be charged, whatever circumſtances are neceſſary to conſtitute the crime imputed, muſt be ſet out, and all beyond are ſurpluſage. Now the firſt count of the preſent indictment does not ſpecify the ſort of pretence by which the money is ſuppoſed to have been obtained: the pretence is of the very eſſence of the crime, and conſtitutes the offence. The defendant therefore ſhould have had notice of this, in order to prepare for his defence; and if the pretence had been ſtated, he might have been able to have proved, that he never made ſuch a miſrepreſentation as was imputed to him: beſides, it is the uſual form of the precedents of indictments to ſtate the pretence. In civil actions, a declaration ſtating that the defendant, by divers falſe pretences and miſrepreſentations, had occaſioned

(a) Cowp. 682.

(b) Co. Lit. 30. 5 Co. 121. 5 Mod. 96.

MASON'S CASE.

ſioned an injury to the plaintiff, or had deprived him of a ſum of money, would be adjudged inſufficient. So would a declaration in *aſſumpſit*, ſtating that the defendant was indebted to the plaintiff in divers ſums of money for divers valuable conſiderations; then if theſe objections would vitiate a declaration, *à fortiori* they will apply to an indictment, where greater certainty is required. In ſuch an indictment as the preſent, certainty is peculiarly neceſſary, becauſe it has been determined that there are various kinds of pretences which are not within the meaning of the ſtatute; and it cannot be contended that all theſe determinations were previous to the paſſing of the Act; for in *the King v. Wheatley*, 1 Geo. 3. (*c*), where the *defendant* had been convicted of ſelling malt liquor by ſhort meaſure, the judgment was arreſted on an objection ſimilar to the preſent. In *the King v. Munoz* (*d*), where the defendant had been convicted for procuring a promiſſory note by *falſe tokens*, under the ſtatute 33 Hen. 8. c. 1. the judgment was arreſted, becauſe the indictment did not ſpecify the *falſe tokens*; and here *falſe pretences* is equally uncertain. In *Sparling*'s *caſe* (*e*), and *Popplewell*'s *caſe* (*f*), convictions on the ſtatute of 6 and 7 Will. 3. c. 11. were quaſhed, becauſe the oaths and curſes were not ſet forth. An indictment alſo has been quaſhed, as being too general, charging that the defendant *malè et negligenter ſe geſſit* in execution of the office of Conſtable (*g*). So in reſcue it is neceſſary to ſtate for what offence the party was in cuſtody. It is no anſwer in this caſe to ſay, that the indictment purſues the words of the ſtatute; for that anſwer was attempted to be given in the caſe of *Davy v. Baker* (*h*), and over-ruled:

(*c*) 2 Burr. 1127.

(*d*) 2 Stra. 1127.

(*e*) 1 Stra. 497.

(*f*) Stra. 686.

(*g*) 1 Stra.

(*h*) 4 Burr. 2471.

MASON'S CASE. —That was in an action on the ſtatute 2 Geo. 2. c. 24. for preventing bribery at elections; and the judgment was arreſted, becauſe the declaration only ſtated that the defendant did receive a gift or reward, without ſpecifying what he received as a reward.

Secondly, The charge is repugnant. It ſtates that the defendant obtained *divers ſums* of money, to wit, *the ſum* of Two Guineas. The ſum alone is repugnant to divers ſums; and if it be rejected as ſurpluſage, it is equally fatal, becauſe then it does not ſpecify what ſums he did obtain. And if this count were to be adjudged ſufficient, without particularizing either the ſums which the defendant obtained, or the pretences by which he obtained them, it would be equally ſufficient to ſtate that he had obtained *divers goods*, without ſpecifying what thoſe goods were.

Thirdly, This count does not conclude either againſt the peace, or againſt the form of the ſtatute. The former of theſe is a ſufficient objection to this count, for every indictment ought to aver the offence to have been committed againſt the peace. It is equally neceſſary that every indictment on a ſtatute ſhould conclude *contra formam ſtatuti*. The judgment upon the preſent record is, Tranſportation, which is a puniſhment not known to the common law; and therefore, if warranted at all, muſt be ſo by ſtatute. But it is ſaid in 2 *Hawk. P. C.* c. 25. ſ. 116. "that a "judgment by ſtatute ſhall never be given on an "indictment at common law, as every indictment "which does not conclude *contra formam ſtatuti*, "ſhall be taken to be; and therefore, if an in-

"dictment

" dictment do not ſo conclude, and the offence " indicted be only prohibited by ſtatute, and " not by common law, it is wholly inſufficient, " and no judgment at all can be given upon it." It muſt be obſerved, that this is not an application to quaſh an indictment, which depends on the diſcretion of the Court; but this indictment comes before the Court by Writ of Error, and if the Court ſee that the indictment is defective, they are bound to reverſe the judgment (*i*). MASON'S CASE. (*i*) 2 Burr. 1127.

As to the Second Count it was objected, that it was manifeſtly defective, inaſmuch as it did not contain a charge of any crime either againſt the common law or ſtatute law.

Mr. *Caldecot*, *for the Crown*.—In anſwer to the objection, that the charge in the firſt count is too general and uncertain, becauſe it does not give the defendant ſufficient notice to prepare his defence; it cannot be denied that the uſe of this general form of indictment is in many inſtances eſtabliſhed law; as in thoſe of a common ſcold, where it is not neceſſary to ſpecify any inſtance. So in charging the offence of keeping a bawdy-houſe, it is ſaid in *Hawkins* (*a*), that it is needleſs to ſet forth any circumſtances. The like for keeping a gaming-houſe, or for conſpiracies. So in all caſes of barratry; and *Hawkins* ſays (*b*), " it is enough to charge that the offender is " a common barrator, without ſhewing any of " the particular facts; for barratry is an offence " of a complicated nature, conſiſting in the repetition of divers acts in diſturbance of the " common peace, all of which it would be too " prolix to enumerate in the indictment." If (*a*) 2 Hawk. P. C. c. 25. ſ. 57. (*b*) 2 Hawk. P. C. c. 25. ſ. 59.

Mason's Case

then in a crime ſo defined, it is only neceſſary to ſtate in the indictment that the defendant is a barrator, where the modes in which a perſon may illegally move and promote ſuits are certainly infinite, it is equally unneceſſary in the preſent inſtance to ſtate more than that the defendant obtained the money by falſe pretences; for upon the principle of notice, it is in itſelf much more likely that a defendant ſhould know the particular acts of fraud and deceit which he has practiſed againſt the proſecutor, which is the preſent caſe, than where the proſecutor is at liberty to range through the tranſactions of a defendant's whole life, which is the caſe in a charge of barratry. It is admitted that all the caſes cited were before the 30 Geo. 2. c. 24. except that of *Rex v. Wheatley (c)*; and that caſe was determined on the ground that it was not an indictable offence. Beſides, this general form of indictment on this ſtatute has obtained ſo long in practice, that it ought to be conſidered as eſtabliſhed law. And it has been held by this Court in many caſes, and particularly in thoſe on the game laws, that printed forms, ſuch as thoſe in *Burn*, ſhew the general ſenſe and underſtanding of the profeſſion. This form of indictment is continued in the lateſt edition of *The Crown Circuit Companion*, which, though not a book of authority affords hiſtorical evidence of the uſe of this form at the Old Bailey; and in point of fact it is well known that many perſons have been tranſported for this offence under this form of indictment. At all events, there is no ground for the objection in this indictment; for it ſtates the ſums of money of which the proſecutor was defrauded, and the times when the fraud was committed.

(c) 2 Burr. 1125.

committed. To this it is objected, that the charge is repugnant; becauſe it is ſtated that the defendant obtained *divers ſums* of money, that is to ſay, *the ſum* of two guineas. But it is ſufficient if one charge be ſtated under the *videlicet*. With reſpect to the ſecond count, it is good, as charging the defendant with an offence at common law, namely, for cheating. MASON'S CASE.

Mr. *Marryatt* in reply, was ſtopped by the Court.

Buller, J.—Several objections have been made on the part of the defendant; but the material one, on which I found my judgment, is, that the indictment does not ſtate what the falſe pretences were. The queſtion is not a new one; for I remember a caſe when I was at the bar, though the name of it does not occur to me now, and I argued it on the analogy to the caſe in *Strange* for obtaining a note by falſe tokens, which entirely governs this. That was a caſe on the ſtatute 33 Hen. 8. c. 1. which makes it an offence to obtain money or goods by falſe tokens. The ſtatute 30 Geo. 2. c. 24. only enlarges the deſcription of the offence in the ſtatute of Hen. 8. Both ſtatutes are made in *pari materiâ*; and whatever has been determined in the conſtruction of one of them, is a ſound rule of conſtruction for the other. The judgment was arreſted in the caſe in *Strange*, becauſe the indictment did not ſpecify the *falſe tokens*: then by the ſame reaſon an indictment on the 30 Geo. 2. c. 24. which ſpeaks of *falſe pretences*, muſt ſtate what the falſe pretences are, otherwiſe the indictment is bad: there is no diſtinction between the two caſes; the

MASON'S CASE.

the ſame objection which held in the one muſt alſo prevail in the other. With reſpect to the form of the indictment; I am clear that the precedents have not been univerſally in the ſame form as the proſecutor's Counſel has ſtated, for it was otherwiſe in the firſt indictment on this ſtatute which I ever tried; the indictment did ſtate what the falſe pretences were. The other objections ſeem to have great weight in them; but it is not neceſſary to conſider them in this caſe, becauſe I am of opinion that the firſt objection is fatal, and that the judgment muſt be reverſed.

Groſe, J.—I am of opinion, with my brother *Buller*, that the objection, that the pretences are not ſpecified, is deciſive, and for the reaſons mentioned by the defendant's Counſel; that the defendant may know what he is to defend, and the Court may ſee what puniſhment they are to inflict. Theſe reaſons apply to all offences. The caſes, mentioned at the bar, of a ſcold, of barratry, and keeping a gaming-houſe, differ materially from this: they conſiſt of ſeveral facts; this of a ſingle one. This is a charge for a preciſe crime, and therefore it muſt be alledged. With reſpect to any practice to the contrary, founded on any faulty precedent, if ſuch a practice has prevailed, it is time that it ſhould be rectified. But ſuch practice cannot always have obtained, for I recollect having tried ſeveral defendants on indictments which ſtated what the falſe pretences were. Therefore, without going further into the caſe, I am clearly of opinion that the indictment cannot be ſupported.

The

The Court reverſed the judgment, and ordered that the defendant ſhould be ſet at liberty. MASON'S CASE.

The King *againſt* Davis.

CASE 180.

THIS was a caſe on the Black Act, reſerved by Mr. Baron *Perryn*, at *Hereford* Summer Aſſizes 1788, for the opinion of the twelve Judges.

An indictment on the Black Act, for ſhooting at any perſon, muſt charge that the offence was done "*wilfully* and *maliciouſly*."

The words of the ſtatute are, "That if any "perſon or perſons ſhall *wilfully* and *maliciouſly* "ſhoot at any perſon in any dwelling-houſe, or "other place, every perſon ſo offending ſhall be "deemed guilty of felony, and ſuffer death with- "out the benefit of clergy."

The indictment ſtated, "that *James Davis*, "being an ill-deſigning and diſorderly perſon, "of a wicked and malicious diſpoſition, &c. &c. "with a certain piſtol, loaded with gunpowder "and a leaden bullet, which he the ſaid *James* "*Davis* in his right-hand had and held, he the "ſaid *James Davis* did *unlawfully*, *maliciouſly*, "and *felonioufly* ſhoot at one———, &c. &c."

The Queſtion was, Whether the indictment could by any poſſible conſtruction, or implication, be ſupported? the drawers of it having neglected to purſue the very words of the ſtatute, by leaving out the word "*wilfully*," and inſerting only that

DAVIS' CASE.

that the offence was committed "unlawfully, "*maliciouſly*, and feloniouſly."

See 1 Black. Rep. 843. See alſo Cox's caſe, ante, p. 69. where the word "wilfully" was held neceſſary 5 Eliz. c. 9.

The Judges aſſembled at Lord *Kenyon*'s houſe on 22d February 1789, to conſider this queſtion, and the point was very much debated.—Some of the Judges thought that the word *wilful* was implied in the word *malicious*; but a great majority were clearly of opinion, that as the Legiſlature had, by the ſpecial penning of the Act, uſed both the words "*wilfully*" and "*maliciouſly*" they muſt be underſtood as a deſcription of the offence; and that the omiſſion, in the preſent indictment, was fatal to its validity.

The priſoner, at the enſuing Aſſizes, was ordered to be diſcharged.

CASE 181.

Green's Caſe.

On an information for obſtructing a Revenue-Officer in the execution of his duty, if it appears that the Officer is an *Alien*, the defendant ſhall be diſcharged.

AT the Summer Aſſizes at *Maidſtone* 1788, *William Green* was tried before Lord *Loughborough* on an information filed by the Attorney-General, on the ſtatute of 19 Geo. 2. c. 34. for aſſaulting and obſtructing *Stephen Jefferies*, "one "of the Officers of the Cuſtoms of our Lord the "King, duly conſtituted and appointed," in the due execution of his ſaid office.

It appeared in evidence, that *Stephen Jefferies* had been a Cuſtom-Houſe Officer many years; that he had taken the oaths initiatory to that employment;

ployment; that he was a native of Sicily, and a ſubject to the King of Naples; that his mother was an Italian, and that he had received an Italian education; but that he was told by the Captain who brought him to England, when he was between eight and nine years old, that his father was an Engliſhman, tho' he had no remembrance whatever of that fact himſelf, either with reſpect to the language which his father ſpoke, or the religion he profeſſed. GREEN'S CASE.

Lord *Loughborough*.—The proſecutor, upon his own admiſſion, is an Alien; and by the Act of Settlement no Alien can hold any office under the Crown of England. The indictment ſtates, that he is an Officer duly appointed; but an Alien cannot be duly appointed; and even if he had been made a Denizen, or naturalized, it would not have rendered him a competent proſecutor on this indictment. 12 and 13 Will. 3. c. 2.

The defendant was acquitted.

John

CASE 182.

John Senior's Caſe.

A caſement is not within the ſtatutes of 4 Geo. 2. c. 32. or 21 Geo. 3. c. 68.

AT the Old Bailey, in September Seſſion 1788, *John Senior* was indicted before Mr. Serjeant *Adair*, Recorder, preſent Mr. Juſtice *Gould*, and Mr. Juſtice *Groſe*, on the ſtatutes 4 Geo. 2. c. 32. and 21 Geo. 3. c. 68. for felonioufly ſtealing one *window caſement, made of iron, lead, and glaſs*, the property of the Benchers of the Middle Temple, fixed to a certain building ſituate in Elm Court, he having no title, or claim of title to the ſame.

The Court.—The ſtatutes upon which this indictment is founded, among the ſeveral articles which they enumerate, do not mention "*a caſement.*" The 4 Geo. 2. c. 32. ſays, that "whoever ſhall ſteal, rip, cut, or break with "intent to ſteal, any *lead, iron bar, iron grate, iron paliſadoes, or iron rail* whatſoever, being "fixed to any dwelling-houſe, &c. ſhall be "tranſported for ſeven years." The 21 Geo. 3. c. 68. gives the Court a diſcretionary power either to tranſport for ſeven years, or to impriſon for a leſs time, ſuch perſons who ſhall "rip, cut, "break or remove, with intent to ſteal any *copper, braſs, bell-metal, utenſil, or fixture*, being "fixed to any dwelling-houſe, &c." The latter Act being made to remedy the defects of the 4 Geo. 2. c. 32. the words "*copper, braſs, bell-metal,*" are not to be taken as ſubſtantive nouns, but as deſcriptions of the ſort of fixtures which the Legiſlature intended to protect. The former Act mentions every ſpecific article by name; and as the article for the ſtealing of which the preſent indictment

indictment was preferred, is not mentioned, the prisoner must *go without day*. SENIOR'S CASE.

Note, the prisoner was indicted for a similar offence in the December Session following, before Mr. Justice *Wilson*, in stealing a casement from a stair-case in *Bernard's Inn*, and acquitted upon the authority of this determination. *(a)*

(a) At the Lent Assizes for Essex 1784, *James Challis* was indicted before Mr. Justice *Gould* on the statute 21 Geo. 3. c. 68. for stealing a wooden gate, with an iron spring latch and clasp, and two pieces of iron called upper eves, fixed in a certain fence, belonging to the dwelling-house of *Samuel Lemon*.—The Court. It appears that this gate was so framed as to be lifted on and off its hinges at pleasure; it cannot therefore be considered as fixed to the freehold. Suppose a tenant not bound by his lease should put up such gates, they would be chattels, which he might take away, and on his death would go to his personal representatives, and not to the heir of the inheritance. Nor can this gate be considered as a fence "set up" in a certain yard belonging to the dwelling-house. There was a case at Kingston on the statute 4 Geo. 2. c. 32. for stealing brass locks from an unfinished and untenanted house; and the Judges held, that as fixtures of brass were not mentioned in that Act, the indictment could not be supported.

William Walker's Case. CASE 183.

AT the Old Bailey, in December Session 1788, present Mr. Justice *Wilson*, and Mr. *Recorder*, *William Walker*, one of the Second Middlesex Jury, being, as he stated, a Member of the *Kirk of Scotland*, objected to be sworn by the usual ceremony of *Kissing* the *Book*, but offered to take the oath according to the ceremony of his own religion, by holding up his hand.

A Scotch Covenanter may be sworn in as a Juryman in a Court of Criminal Law, by the ceremony of holding up his hand, without kissing the book.

The Court said, there was no objection to his being admitted to take the oath in this form, and he was so sworn accordingly.

Vide Mildone's case, ante, 348.

Cock-

CASE 184.

Cockwaine's Caſe.

Quære. If unlawfully obtaining and converting the goods of a tradeſman, under a falſe pretence of being ſent for them to ſhew a cuſtomer, is felony?

AT the Old Bailey, in December Seſſion 1788, *Iſaac Cockwaine* was indicted before Mr. Juſtice *Wilſon*, for feloniouſly ſtealing *two men's hats*, the property of *Benjamin Rankin;* and the Jury found A SPECIAL VERDICT, "That "the priſoner, on the 7th November 1788, went "to the ſhop of the proſecutor, a Hatter in Lea-"denhall-ſtreet, with an intent *unlawfully* to ob-"tain and convert to his own uſe the goods men-"tioned in the indictment; and told the ſaid "Mr. *Rankin*, that a Mr. *Sanſom*, who lived in "a neighbouring ſtreet, was going out of town "early the next morning, and wanted a new "round hat, and deſired that he, the ſaid Mr. "*Rankin*, would take ſome hats of that kind to "ſhew to Mr. *Sanſom;* that Mr. *Rankin* went "accordingly to Mr. *Sanſom*'s, in London-ſtreet; "and while he was gone, the priſoner returned "in about three minutes to the ſhop of Mr. *Ran-"kin*, and ſaid to a ſervant of Mr. *Rankin*'s, who "had been in the ſhop when the priſoner firſt "went there, "*Your maſter is at our houſe, and "he has ſent me, and ſays, you muſt give me the "cocked hat and round hat that are in the win-"dow;*" that the ſervantman accordingly, then "and there, delivered to the priſoner the ſaid "two hats, who went away with them, and con-"verted them to his own uſe; and that the ſaid "Mr. *Rankin* did not in truth and in fact ſend "him or any other perſon for the ſaid hats. But "whether, under theſe circumſtances, the ſaid "*Iſaac Cockwaine* is guilty of felony, the Jurors "pray the direction of the Court. And if, &c."

This

This verdict was afterwards drawn up as a ſpecial caſe, and referred to the conſideration of the twelve Judges; but no determination on it has yet been publicly delivered, and the priſoner remains in Newgate. COCKWAINE'S CASE.

Woodcock's Caſe.

CASE 185.

AT the Old Bailey, January Seſſion 1789, *William Woodcock* was tried before Lord Chief Baron *Eyre*, preſent Mr. Juſtice *Aſhhurſt*, and Mr. Serjeant *Adair*, Recorder, for the wilful murder of *Silvia Woodcock*, his wife.

In murder, the declarations of the deceaſed after the mortal wound is given, may be received in evidence, tho' the party did not *expreſs* any apprehenſion of approaching diſſolution; but the examination of ſuch a perſon taken by a magiſtrate *extrajudicially* cannot be received.

It appeared in evidence that ſhe was found lying in a ditch, in a narrow lane, called *Robinſon's Lane*, in the vicinity of *Chelſea*, in the county of *Middleſex*. She had received eight wounds about the head, face, and neck, which ſeemed to have been inflicted with the end of a blunt inſtrument; and was ſo exhauſted with the loſs of blood, as to be apparently dead. The body was taken to Chelſea poor-houſe, put into a warm bed, and by medical aſſiſtance reſtored to life. In the courſe of eight hours, ſhe recovered her ſenſes to ſuch a degree, as to be enabled to give a credible relation of the circumſtances by which this cataſtrophe had happened. The overſeers of the pariſh, therefore, thought it expedient to deſire the attendance

WOODCOCK'S CASE.

tendance of a magiſtrate, for the purpoſe of taking her information in legal form.

Mr. *Read*, a Juſtice of the Peace for the county, attended at the poor-houſe accordingly. He found the informant, who was a baptized mulatto, and native of the Eaſt-Indies, in a ſtate of perfect recollection. He told her, that he was a magiſtrate come to take her examination, and admoniſhed her to ſpeak the truth; and as ſhe appeared ſenſible of the impiety and dangers of falſehood, he adminiſtered an oath to her, and received her information; which he reduced, in her own words, into writing. He afterwards read it over to her with great deliberation, and gave it to her to ſign, and ſhe made her mark on the paper in approbation of its contents. The magiſtrate then ſigned it himſelf; and being proved on the trial, it was read in evidence.

It alſo appeared, from the evidence of the ſurgeons, that ſhe died in about eight-and-forty hours after the examination had been taken, and that it was impoſſible from the firſt moment that ſhe could live long; but that although ſhe retained her ſenſes to the laſt moment, and repeated the circumſtances of the ill uſage ſhe had received, ſhe never expreſſed or ſeemed ſenſible of her approaching diſſolution. The evidence, independent of the *information* or *declarations* of the deceaſed, was of a very preſſing and urgent nature againſt the priſoner.

Under theſe circumſtances a queſtion aroſe with THE COURT, Whether the evidence which had been obtained from the deceaſed could legally be left

left with the Jury? The learned Judge therefore ſtated the caſe to them, independent of that evidence; and then ſtated his opinion of the admiſſibility of the examination to the following effect. WOODCOCK's CASE.

Ld. Ch. Baron *Eyre*.—If I was ſatisfied that the caſe was quite full, without the circumſtances which the deceaſed has diſcloſed, I ſhould willingly omit to ſtate them as evidence againſt the priſoner, becauſe there is ſome difficulty as to the legality of their admiſſion. Great as a crime of this nature muſt always appear to be, yet the enquiry into it muſt proceed upon the rules of evidence. The moſt common and ordinary ſpecies of legal evidence conſiſts in the depoſitions of witneſſes taken on oath before the Jury, in the face of the Court, in the preſence of the priſoner, and received under all the advantages which examination and croſs-examination can give. But beyond this kind of evidence there are alſo two other ſpecies which are admitted by law: The one is the dying declaration of a perſon who has received a fatal blow: the other is the examination of a priſoner, and the depoſitions of the witneſſes who may be produced againſt him, taken officially before a Juſtice of the Peace, by virtue of a particular Act of Parliament, which authorizes Magiſtrates to take ſuch examinations, and directs that they ſhall be returned to the Court of Gaol Delivery. This laſt ſpecies of depoſition, if the deponent ſhould die between the time of examination and the trial of the priſoner, may be ſubſtituted in the room of that *vivâ voce* teſtimony which the deponent if living, could alone have given, and is admitted of neceſſity as evidence of the fact.

In

WOODCOCK'S CASE.

In the preſent caſe a doubt has ariſen with the Court, to which doubt I entirely ſubſcribe, Whether the examination of the deceaſed, taken in writing at the poor-houſe by Mr. *Read*, the Magiſtrate, is an examination of the *nature* I have laſt deſcribed? It was not taken, as the ſtatute deſcribes, in a caſe where the priſoner was brought before him in cuſtody; the priſoner therefore had no opportunity of contradicting the facts it contains. It was not in the diſcharge of that part of Mr. *Read*'s duty, by which he is, on hearing the witneſſes, to bail or commit the priſoner; but it was a voluntary and extrajudicial act, performed at the requeſt of the Overſeer; and although it was a very proper and prudent act, yet being voluntary, and under circumſtances where the Juſtice was not authoriſed to adminiſter an oath, it cannot be admitted before a Jury as evidence; for no evidence can be legal unleſs it be given upon oath, judicially taken.

But although we muſt ſtrip this examination of the ſanction to which it would have been entitled, if it had been taken purſuant to the direction of the Legiſlature, yet ſtill it is the declarations of the deceaſed, ſigned by herſelf, and it may be claſſed with all thoſe other confirmatory declarations which ſhe made after ſhe had received the mortal wounds, and before ſhe died. Now the general principle on which this ſpecies of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falſehood is ſilenced; and the mind is induced by the moſt powerful conſiderations to ſpeak the truth: a ſituation ſo ſolemn and ſo awful, is conſidered by the law as creating an obligation

obligation equal to that which is impoſed by a poſitive oath adminiſtered in a Court of Juſtice. But a difficulty alſo ariſes with reſpect to theſe declarations; for it has not appeared, and it ſeems impoſſible to find out, whether the deceaſed herſelf apprehended that ſhe was in ſuch a ſtate of mortality as would inevitably oblige her ſoon to anſwer before her Maker for the truth or falſehood of her aſſertions. The ſeveral witneſſes could give no ſatisfactory information as to the ſentiments of her mind upon this ſubject. The ſurgeon ſaid ſhe did not ſeem to be at all ſenſible of the danger of her ſituation, dreadful as it appeared to all around her; but lay, ſubmitting quietly to her fate, without explaining whether ſhe thought herſelf likely to live or die. Upon the whole of this difficulty, however, my judgment is, that inaſmuch as ſhe was mortally wounded, and was in a condition which rendered almoſt immediate death inevitable; as ſhe was thought by every perſon about her to be dying, though it was difficult to get from her particular explanations as to what ſhe thought of herſelf and her ſituation; her declarations, made under theſe circumſtances, ought to be conſidered *by a Jury*, as being made under the impreſſion of her approaching diſſolution; for reſigned as ſhe appeared, ſhe muſt have felt the hand of death, and conſidered herſelf as a dying woman. She continued to repeat the facts ſhe diſcloſed rationally and uniformly, from the moment her ſenſes returned, until her tongue was no longer capable of performing its office. Declarations ſo made are certainly intitled to credit; they ought therefore to be received in evidence: but the degree of credit to which they are intitled muſt always be a matter

WOODCOCK'S CASE.

WOODCOCK'S CASE.

for the ſober conſideration of the Jury, under all the circumſtances of the caſe.

The priſoner was convicted, and executed.

CASE 136.

Sherrington and Bulkley's Caſe.

OLD BAILEY, FEBRUARY SESSION 1789.

In what name an indictment of larceny muſt lay the property, when it reſides in *Truſtees*, under an Act of Parliament; ſuch Truſtees not being incorporated.

THE priſoners were indicted on the ſtatute 21 Geo. 3. c. 68. for ſtealing a quantity of lead affixed to the *Work-Houſe* of the Poor of the Old Artillery Ground; and the property was laid to belong to "*the Truſtees of the Poor of the* "*Old Artillery Ground.*"

By an Act of Parliament paſſed 14 Geo. 3. c. 30. certain perſons therein named, and their ſucceſſors, to be elected and appointed under and by virtue of the ſaid Act, are appointed *Truſtees* for putting in execution all the powers thereby given for providing a Work-houſe, and for employing and maintaining the poor of the ſaid Old Artillery Ground, or any matter or thing concerning the ſame; and all *fixtures*, furniture, and other things bought and provided for the uſe of the poor, are veſted in the ſaid Truſtees and their ſucceſſors, for the purpoſes of the Act. And then it goes on in theſe words: "And the ſaid Truſ-"tees are hereby empowered to prefer or order "the preferring of any bill or bills of indictment "againſt any perſon or perſons who ſhall ſteal, "take, or carry away any or any part of ſuch "things; and the monies and things which ſhall

"be

" be ſo ſtolen, taken, or carried away, ſhall in " every ſuch indictment be laid and deemed, " and taken to be the property of *the Truſtees* " *of the Poor of the Old Artillery Ground.* And " every indictment ſo preferred ſhall be held good " in law to all intents and purpoſes."

SHERRINGTON and BUCKLEY'S CASE.

The Queſtion was, Whether the indictment had well laid the property? And the Court held that it had not; for as the Act of Parliament had not incorporated the Truſtees, and by that means given them collectively *a public name*, the property ſhould have been laid as belonging to A. B. C. *&c.* by their proper names, and the words " *Truſtees of the Poor of the Old Artillery* " *Ground*" ſubjoined as a deſcription of the capacity in which they were authoriſed by the Legiſlature to act.

See Patrick and Peppe's Caſe, ante, p 244.

Denby's Caſe.

CASE 187.

AT the Gaol Delivery for *Kingſton* in the county of *Surrey*, on Thurſday 26 March 1789, *John Edwards* was in the calendar of commitments on a charge of having burglariouſly broken and entered the palace of his Grace the *Archbiſhop of Canterbury* at *Lambeth* in that county.

A Grand jury cannot receive in evidence *the examination* of a witneſs, for the purpoſe of finding a bill on a ſuſpicion that the witneſs has been tampered with by the priſoner.

One *Denby*, a witneſs, whoſe information before the Magiſtrate had been taken in writing, purſuant to the ſtatutes of 1 and 2 Philip and Mary, c. 13. and 2 and 3 Philip and Mary, c. 10. on being produced before the Grand Jury, prevaricated in ſuch a manner as to induce a very

DENBY'S CASE.

ſtrong ſuſpicion that he had been tampered with on the behalf of the priſoner. The Grand Jury therefore applied to the Court for the depoſitions taken before the Magiſtrate.

But the Court (*a*) were of opinion, That as the beſt evidence was the *vivâ voce* teſtimony of *Denby* himſelf, they could not abandon that, and reſort to the ſecondary kind of evidence reſulting from his written depoſition; and on this ground the application was refuſed (*b*).

(*a*) Mr. J. *Gould*, with the concurrence of Mr. B. *Hotham*.

(*b*) A ſimilar application was refuſed by Mr. J. *Gould* at the laſt Eſſex Aſſizes.

CASE 188.

John Wilkins's Caſe.

Quære, Whether contriving to exchange goods of no value for goods of value, under a falſe pretence, can be conſtrued felony.

AT the Old Bailey, April Seſſion 1789, *John Wilkins* was indicted for ſtealing thirty-ſix pair of ſilk ſtockings, and twelve pair of thread ſtockings, the property of *William Wayte*. The Jury found the following facts, and the caſe was reſerved for the opinion of the twelve Judges.

Caſe. That the proſecutor, Mr. *Wayte*, was a Hatter and Hoſier, in Panton-ſtreet, Clare-market; and that on the 9th February preceding the trial, he delivered two parcels, containing the goods mentioned in the indictment, to his apprentice, with directions to carry them to Mr. *Heath*, a cuſtomer. That as the apprentice was going up Ludgate-hill, with the parcels under his arm, he was met by the priſoner at the bar, who aſked him where he was going; and the apprentice anſwered, "*To Mr. Heath*'s." That

That the priſoner, producing a ſmall parcel, replied, "I was juſt going to your maſter's with "this parcel: here, do you take it, and give it "to your maſter; there is a letter inſide, and it "muſt be immediately forwarded to Mr. *Brown*." That the apprentice then delivered the two parcels for Mr. *Heath* to the priſoner, and the priſoner delivered his parcel to the apprentice. That the parcel which was delivered by the priſoner only contained old rags of no value; and that by falſely pretending that he was going to the houſe of the proſecutor for Mr. *Heath*'s parcels, he had contrived to make this *exchange of parcels*, with an intent to *unlawfully* obtain and convert to his own uſe the goods mentioned in the indictment; but whether he is thereby guilty of the crime with which he is charged, the Jurors pray to be further adviſed. WILKINS' CASE.

This caſe at preſent remains before the Judges for their conſideration.

APPENDIX.

CASE 189.

Fearſhire's Caſe.

Parole evidence cannot be received of the information given before a Magiſtrate, either in felony or miſdemeanor, notwithſtanding it was not reduced into writing.

AT the Sittings of the King's Bench for Middleſex after Trinity Term 1779, *John Fearſhire* was tried before Lord *Mansfield* on an indictment for a miſdemeanor.

The Counſel for the proſecution attempted to give parole evidence of the information which had been given againſt the defendant before a Juſtice of the Peace, and on which the Juſtice had granted a warrant to apprehend the defendant.

See 1 and 2 Phil. and Mar. c. 13. ſ. 4. and 2 and 3 Phil. and Mar. c. 10.

Mr. *Dunning*, Counſel for the defendant, objected to the admiſſion of this evidence, on the ground, that as it was the duty of the Magiſtrate to take informations in writing, the preſumption of law was, that he had taken the information in writing in the preſent caſe; and that as the written information, which was the beſt evidence, was not produced, no parole teſtimony could be admitted to ſupply the want of it.

The Counſel for the Crown replied, That neither the practice of Magiſtrates, nor the ſtatutes of Philip and Mary, required the information of witneſſes to be taken in writing, except in caſes of treaſon, felony, or very high and aggravated miſdemeanors; and that in miſdemeanors of light complection, like the preſent, the conſtant practice was, to take the parole evidence of the witneſs

witneſs on oath, and to diſpenſe with the form of reducing it into writing. FEARSHIRE'S CASE.

Lord *Mansfield*.—It is the duty of the Magiſtrate to take all charges, of whatſoever nature, kind, or complection they may be, in writing. In the preſent caſe parole teſtimony cannot, at any rate, be given of the ſubject matter of the information, unleſs it be previouſly ſhewn, that the informant did not give his depoſition on oath, and that his information was not reduced into writing. But I am of opinion, that as it is the indiſputable duty of every Juſtice of Peace to take the information in writing in all caſes, the preſumption is, that he has in this caſe done his duty, by taking it in writing, and therefore the parole evidence now offered ought not to be received. Vide the caſe of R. v. Jacobs, ante, 285, 286.

The parole teſtimony was accordingly rejected, and the defendant was acquitted in conſequence of this objection (*a*). (*a*) I was favoured with this caſe by Mr Serjeant Hum-phreys, from a valuable collection of Manuſcripts in his poſſeſſion.

The King *againſt* Sloper. CAS. 190.

Vide Ante, 81, 82.

IN this caſe the Jury acquitted the priſoner on the fifth count, and found the following Special Verdict: "That the priſoner, *Joſeph Sloper*, "was, on the 26 of October laſt, an officer "employed in the buſineſs relating to the Poſt-"Office, *to wit*, in ſtamping and facing letters "which were brought to the General Poſt-Office, "ſituate, &c. to be ſent from London by the "poſt;

SLOPER'S CASE. "poſt; and being ſuch officer, did on the 26th "of October, &c. ſecrete a letter, ſubſcribed "with the name *J. Price*, dated the 26th Octo- "ber 1771, and directed to Mrs. *Kezia Price*, "Hay, Breconſhire; which letter came to the "hands and poſſeſſion of the ſaid *Joſeph Sloper*, "being ſuch officer as aforeſaid, and which let- "ter contained therein a Bank-Note in the "words and figures ſet forth in the indictment. "—That the priſoner did ſecrete the ſaid letter "in the execution of his office as a Stamper and "Facer, without opening the ſame, from the "26th October to the 16th December, and "without knowing that the Bank-Note above- "mentioned was contained therein, but with in- "tent to defraud the King of the poſtage thereof, "which had been paid."

The determination of the Judges upon this caſe was never publicly communicated. The priſoner appears in the calendars of the Gaol of Newgate until July 1777, in which ſeſſion he remains for judgment; but in the following Seſſion, *viz.* September 1777, there is no account of him.

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